FILED

(1)

No. 02 0 2 6 8 2 NOV - 1 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN
TODD & EVANS, PLLC
1615 M Street, NW
Washington, DC 20036
(202) 326-7900

HENRY B. GUTMAN
SIMPSON THACHER
& BARTLETT
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

JOHN THORNE
Counsel of Record
VERIZON COMMUNICATIONS INC.
1515 N. Courthouse Rd.
Arlington, VA 22201
(703) 351-3900

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, NW –
Suite 800
Washington, DC 20036
(202) 775-0184

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

146 pp

QUESTIONS PRESENTED

1. Whether allegations of inadequacies in a monopolist's affirmative assistance to its rivals, including resellers—as newly provided by incumbent local telephone companies under the Telecommunications Act of 1996—state a claim for unlawful unilateral predatory conduct under Section 2 of the Sherman Act.

2. Whether antitrust and Communications Act standing extends to indirect purchasers, *i.e.*, the customers of the defendant's customer, asserting injuries wholly derivative of the direct customer's injury, even when invoking only the direct customer's legal rights.

RULE 29.6 STATEMENT

Verizon Communications Inc. is the successor corporation of Bell Atlantic Corp., named as defendant and appellee below. Verizon has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Background	2
B. This Case	5
REASONS FOR GRANTING THE PETITION	9
I. THE EXPANSION OF ANTITRUST DUTIES SHOULD BE REVIEWED	11
A. The Second Circuit Decision, In Conflict With The Seventh Circuit Holding In *Goldwasser* And With Doctrinal Limits Recognized In Other Circuits, Improperly Expands Section 2 Duties Of Affirmative Assistance	11
B. The Second Circuit Decision, In Conflict With Other Circuits, Improperly Endorses "Monopoly Leveraging" As A Section 2 Theory	21
II. THE STANDING RULINGS SHOULD BE REVIEWED	23

TABLE OF CONTENTS—Continued

	Page
III. THE ISSUES PRESENTED SHOULD BE REVIEWED NOW	26
A. No Further Record Is Needed	27
B. Deferring Review Would Create Substantial Harm	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991)	13, 21
Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 (5th Cir. 1980)	13, 20
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	17
Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)	24, 25, 27, 28
Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984)	22
AT&T Co. v. Central Office Tel., Inc., 524 U.S. 214 (1998)	24, 26
AT&T Co. v. FCC, 220 F.3d 607 (D.C. Cir 2000)	4
AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)	2, 3, 16
Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 1753 (2002)	3
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	7, 24
City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir. 1992)	13
City of Vernon v. Southern California Edison Co., 955 F.2d 1361 (9th Cir. 1992)	14
Competitive Telecomms. Ass'n v. FCC, 998 F.2d 1058 (D.C. Cir. 1993)	24
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	16

TABLE OF AUTHORITIES

	Page
Covad Communications Co. v. Bell Atlantic Corp., 201 F.Supp.2d 123 (D.D.C. 2002)	12, 21
Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002)	12, 29
DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989)	14
DM Research, Inc. v. College of Amer. Pathologists, 170 F.3d 53 (1st Cir. 1999)	28
Eleven Line, Inc. v. North Texas State Soccer Ass'n, 213 F.3d 198 (5th Cir. 2000)	22
Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979)	25
In re EVIC Class Action Litigation, 2002 WL 1766554 (S.D.N.Y. July 31, 2002)	29
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	20
Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)	21
Flittie v. Solem, 827 F.2d 276 (8th Cir. 1987)	26
Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)	*passim*
Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982)	26
Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977)	16
Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992)	23, 24, 25
HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874 (6th Cir. 1991)	13
Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737 (3d Cir. 1996)	13

TABLE OF AUTHORITIES—Continued

	Page
Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991)	12, 14
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).	24
Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999)	22
J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 122 S. Ct. 593 (2001)	21
Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990)	24
Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989)	21
Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539 (4th Cir. 1991)	13, 25
L.T. Barringer & Co. v. United States, 319 U.S. 1 (1943)	7, 26
MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983)	*passim*
Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983)	25
Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc., 919 F.2d 1517 (11th Cir. 1990)	25
Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc., 63 F.3d 1540 (10th Cir. 1995)	22
NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998)	27
Ohio Bell Tel. Co. v. CoreComm Newco, Inc., 214 F.Supp.2d 810 (N.D. Ohio 2002)	29
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	8, 17, 19

TABLE OF AUTHORITIES—Continued

	Page
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	20
Phonetele, Inc. v. AT&T Co., 664 F.2d 716 (9th Cir. 1981) *modified*, 1982 WL 11277 (9th Cir.)	20
Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918)	23, 26
SmileCare Dental Group v. Delta Dental Plan of Calif., Inc., 88 F.3d 780 (9th Cir. 1996)	27
Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)	22
Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990)	15, 19, 20
United States v. Estate of Romani, 523 U.S. 517 (1998)	20
United States v. Fausto, 484 U.S. 439 (1988)	20
United States v. National Ass'n of Secs. Dealers, Inc., 422 U.S. 694 (1975)	27
United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912)	16
United States v. United States Steel Corp., 251 U.S. 417 (1920)	14
United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002)	3, 15, 18
United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir. 1990)	23
Verizon Communications Inc. v. FCC, 122 S. Ct. 1646 (2002)	2, 3
Warth v. Seldin, 422 U.S. 490 (1975)	25
Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp., 2002 WL 31010490 (S.D.N.Y. Sept. 4, 2002)	29

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
15 U.S.C. § 2	*passim*
§ 15	24
18 U.S.C. § 1964(c)	24
Communications Act of 1934, 47 U.S.C. § 151 *et seq.*	
§ 152 note	13, 21
§ 202(a)	6, 7
§ 206	*passim*
§ 207	*passim*
§ 251	*passim*
§ 252	3, 6
§ 253	2
§ 271	4
Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56	*passim*

OTHER MATERIALS

First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (*Local Competition Order*), 11 FCC Rcd 15,499 (1996), modified, 11 FCC Rcd 13042 (1996), vacated in part, *Iowa Utils. Bd v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), decision on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), aff'd in part, rev'd in part, *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646 (2002)	4
Memorandum Opinion and Order, *Starpower Communications*, 15 FCC Rcd 11277 (2000)	3

TABLE OF AUTHORITIES—Continued

	Page
Memorandum Opinion and Order, *Application of Verizon New England*, 16 FCC Rcd 8988 (2001)	5
Order, *Bell Atlantic-New York Authorization*, 15 FCC Rcd 5413 (2000)	5
Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*), remanded, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir 2002)	18
Order Addressing OSS Issues, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (NY PSC Case Nos. 00-C-0008 *et al.*)	5
Order Approving Interconnection Agreement, 1997 WL 410707 (NY PSC Case No. 96-C-0723)	4
Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (NY PSC Case Nos. 00-C-0008 *et al.*)	5
Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 517633 (NY PSC Case Nos. 00-C-0008 *et al.*)	5
Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989)	16, 27
P. Areeda & H. Hovenkamp, *Antitrust Law* Vol. III (2d ed. 2000)	27
Vol. IIIA (2d ed. 2002)	15, 16, 19

TABLE OF AUTHORITIES—Continued

	Page
Baumol and Ordover, *Use of Antitrust To Subvert Competition*, 28 J.L. & Econ. 247 (1985)	29
S. Breyer, *Regulation and Its Reform* (1982)	14
Comments of AT&T, Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed May 26, 1999), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6007444999	18
Editorial, *Son of Frankentobacco*, Wall St. J., Aug. 23, 2002	28
Jeremy Feiler, *Verizon Battles Antitrust Suits*, Phil. Bus. J., July 12, 2002	28
William J. Kolasky, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, *North Atlantic Competition Policy: Converging Toward What?*, address dated May 17, 2002, http://www.usdoj.gov/atr/public/speeches/11153.pdf	22
Snyder & Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991)	29
L. Sullivan & W. Grimes, *The Law of Antitrust: An Integrated Handbook* (2000)	17
Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U. L.J. 433 (1987)	15, 28

PETITION FOR A WRIT OF CERTIORARI

Verizon Communications Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' amended opinion (App. 1a-48a) is reported at 305 F.3d 89. The district court's initial opinion (App. 49a-61a) is reported at 123 F.Supp.2d 738. The district court's second opinion (App. 62a-68a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2002. On a petition for panel and en banc rehearing, the court amended its opinion, then denied the petition on October 1, 2002. App. 69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15, along with provisions of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-114, 110 Stat. 56, are set out at App. 70a-103a.

STATEMENT

The Second Circuit held that alleged deficiencies in the terms of affirmative assistance to rivals (as Verizon newly provides to local competitors by law) can be litigated as treble-damages actions under Section 2 of the Sherman Act. That ruling conflicts with the Seventh Circuit's ruling on this specific issue (*Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000)) and with other circuits' rulings strictly limiting the doctrines invoked to transform deficient

affirmative assistance into predatory conduct. The Second Circuit also held that retail customers of Verizon's wholesale customer, having only an indirect-purchaser relation to Verizon, have standing under the antitrust laws and the Communications Act to sue for injury derivative of the direct customer's harm, even when asserting only the substantive rights of the direct customer, who had committed to exclusive nonjudicial dispute resolution and secured relief. This ruling abrogates standing limits recognized elsewhere. Verizon challenges both rulings.

A. Background

This Court's decisions explain the features of the 1996 Act that form pertinent background here. *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654, 1662-63, 1681 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999). That Act created "something brand new"–"the wholesale market for leasing network elements." *Verizon*, 122 S. Ct. at 1681. It forced incumbent local telephone companies (like Verizon's subsidiaries) to change their local telephone businesses: they now must assist newly created intermediaries to displace them in providing local service to local customers, on terms designed "to give aspiring competitors every possible incentive to enter local retail telephone markets." *Id.* at 1661. The forced change in the incumbents' local businesses was described by a "leading backer of the Act in the Senate" as "'extraordinary'" because incumbents were being ordered to help "'competitors come in and try to beat your economic brains out.'" *Id.* (quoting 141 Cong. Rec. 15572 (1995) (Sen. Breaux)).

Creating new rights and duties, the 1996 Act goes beyond ending legal barriers to local entry (47 U.S.C. § 253) and requiring *all* telecommunications carriers to interconnect, so that a customer physically served by one carrier can communicate with customers physically served by other carriers (§ 251(a)). The Act also imposes on incumbents new duties

to provide affirmative assistance to new rivals, including the duties to provide retail services at a wholesale discount for resale and to rent pieces of the local network ("unbundled network elements," or UNEs) so that the new rivals can use the incumbents' own facilities to displace the incumbent as provider of local service. § 251(c).

To implement the duties, the 1996 Act relies on two levels of expert regulators, federal and state, and guarantees rapid regulatory response to rivals' demands for assistance. *First*: the Federal Communications Commission has issued massive and evolving orders adopting regulations to prescribe what the statutory duties should mean in application. § 251(d).[1] *Second*: for particular cases, the Act creates a negotiation-and-arbitration regime that guarantees a prompt, judicially reviewable regulatory decision on assistance demands, with advance regulatory review and approval of all terms of incumbent-rival relations (§ 252(b), (c), (e)(1)-(5), (i)) and regulatory enforcement of approved terms.[2] *Third*: state and federal regulators review and enforce compliance with the assistance duties before allowing the former Bell incumbents

---

[1] *Iowa Utilities* and *Verizon* involved some of the major orders, concerning pricing and other terms of assistance. Regarding pricing, the FCC has adopted a "novel ratesetting" methodology to maximize entry incentives "short of confiscating the incumbents' property." *Verizon*, 122 S. Ct. at 1661. Regarding which pieces of the network must be rentable, sweeping FCC requirements have twice been set aside as overbroad (and hence deterring independent investment by the new rivals). *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424, 427 (D.C. Cir. 2002) (reversing FCC's decision, on remand from reversal of first attempt in *Iowa Utilities*, 525 U.S. at 388-92, explaining that "too broad" a sharing duty can *undermine* the goal of spurring *independent* investment).

[2] *See, e.g., Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304-05 (4th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 1753 (2002); Memorandum Opinion and Order, *Starpower Communications*, 15 FCC Rcd 11277, 11280, ¶ 7 (2000) (FCC recognizing enforcement authority).

to offer long-distance service in each State (§ 271), and the regulators have adopted detailed requirements for high levels of compliance with the assistance obligations.[3]

In 1997, AT&T, as a new local competitor, entered into a binding agreement with Verizon, approved by the New York regulatory commission under the 1996 Act, for the purchase of "access" to Verizon's facilities and services. The Verizon-AT&T agreement "provides for dispute resolution procedures that are the 'exclusive remedy for all disputes between [Verizon] and AT&T arising out of this Agreement or its breach'" and "requires the parties to the agreement to resolve their disputes through arbitration and the administrative process." App. 5a, 38a n.19. Respondent, a New York law firm, bought local telephone service from AT&T and had no relationship with Verizon. App. 1a, 5a. By respondent's description, AT&T was engaged in "resale" of phone service physically being furnished by Verizon.[4]

[3] Verizon was the first incumbent to receive long-distance authorization—for New York, in late 1999 (*AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000))—and now has long-distance authorization for more than 85% of its lines, based on state and federal regulatory commission findings of compliance with the affirmative assistance duties of Section 251.

[4] *See* Ct. App. Br. of Trinko 39-40 ("resale agreement"). Economically, AT&T was a reseller of service physically being furnished by Verizon regardless of which of two options it chose under the agreement: purchasing Verizon "service" at a wholesale price for "resale"; or purchasing the end-to-end package of Verizon-assembled piece parts (UNEs) commonly called "UNE platform." *See* Order Approving Interconnection Agreement, 1997 WL 410707 (NY PSC Case No. 96-C-0723), at *41, *47, *56-57 (providing both options); *Iowa Utils.*, 525 U.S. at 393-95. Whereas "service" is bought in the former arrangement, the latter involves local loop *occupation* by the competitor, because purchase of a loop as an "unbundled network element" gives the competitor *exclusive* occupation of that piece of the incumbent's network. *Local Competition Order*, 11 FCC Rcd 15,499, ¶ 385 (1996).

In December 1999, Verizon encountered a problem in new software (installed to satisfy regulatory demands in the long-distance approval process) for the placement and confirmation of rivals' orders for "access" from Verizon. AT&T complained to regulators, and on March 9, 2000, Verizon entered a consent decree with the FCC "to resolve the problem promptly and pay $3 million to the United States and $10 million to AT&T and other competitors." App. 5a. By July 2000, the problem was resolved, and the decree dissolved. *Id.*[5] The court of appeals here noted the efficient, nonjudicial resolution of the only problem concretely mentioned by respondent in this case. App. 24a.

B. This Case

1. The day after the March 9 consent decree, respondent brought this consumer class action against Verizon. It broadly complained that it had "received poor local phone service" from AT&T and that Verizon, with "no valid business reason," had treated orders by competitors less favorably than it treated orders for retail service from its own customers. App. 6a-7a. Aside from a reference to the just-entered consent decree, the complaint contained no specifics, and it sought to certify a class of all customers of Verizon's competitors dating back to 1996. App. 7a. Respondent alleged that the deficiencies amounted to violations of Section

[5] *See* Memorandum Opinion and Order, *Application of Verizon New England*, 16 FCC Rcd 8988, 9034-35, ¶ 87 (2001) (summarizing events); Order, *Bell Atlantic-New York Authorization*, 15 FCC Rcd 5413 (2000) (March 9 consent decree). The New York commission also addressed the problem. Order Addressing OSS Issues, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (NY PSC Cases 00-C-0008 *et al.*) (noting AT&T's redress); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 517633 (NY PSC); Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (NY PSC).

2 of the Sherman Act, warranting treble damages and injunctive relief, as well as violations of Section 202(a) (discrimination) and Section 251 (interconnection) of the Communications Act. App. 6a.

The district court dismissed. App. 49a-61a. The court found antitrust standing but, relying on *Goldwasser*, held that no Section 2 violation was stated by the allegations of deficiencies in providing rivals local loop occupation or service. App. 55a-56a. The court again so held after respondent amended its complaint and described the challenged conduct as Verizon's breach of its agreement with AT&T. App. 63a, 66a-67a. As for the Communications Act claims, the court concluded that respondent, being neither a customer nor a competitor of Verizon, had no substantive rights of its own under Sections 202(a) and 251 and for that reason could not sue, because the Act's suit-authorizing provisions, Sections 206 and 207, do not abrogate the normal rule requiring a party to assert its own legal rights, not a third party's. App. 59a-61a. The court again so held in rejecting the amended complaint. App. 64a-66a.

2. On appeal (which respondent's brief limited to the damages claims), the court of appeals affirmed the dismissal only of the claim under Section 251. App. 16a-25a. Stressing "[t]he elaborate process of negotiation and arbitration set forth in section 252" and the central role of "state regulatory bodies, which have specialized expertise in the area" (App. 23a), the court held that, once an agreement is entered under Section 252, the incumbent's duties are governed not by Section 251 but by the agreement (here, with its dispute-resolution mechanism). The court then reinstated the Communications Act § 202(a) and Sherman Act § 2 claims.

In reinstating the claim under Section 202(a), the court accepted that respondent was asserting only AT&T's Section 202(a) rights (to receive service on nondiscriminatory terms),

not its own (it receives no service from Verizon at all). App. 13a. Nevertheless, while noting the general rule against third-party standing (App. 10a), the court held that the rule was abrogated by the general reference in Sections 206 and 207 to "the person or persons injured" and "person claiming to be damaged," thus allowing suit by any person injured by a violation of any substantive provision of the Communications Act, even if the rights violated are only those of someone else. App. 11a-12a. The court deemed it irrelevant that Section 202(a) itself conferred no rights on respondent, a customer's customer (App. 13a-14a) and cited *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 13 (1943), as indicating that the Interstate Commerce Act, a precursor to the Communications Act, allowed suits by persons lacking rights under substantive provisions (App. 15a). The court also concluded that respondent's alleged receipt of "poor phone service" *from AT&T* was not "indirect" because it was "distinct" from AT&T's injury. App. 15a-16a.

In reinstating the Sherman Act § 2 damages claim, the court of appeals first concluded that respondent had standing. App. 25a-28a. The court recognized that the only asserted injury was "poor phone service" that respondent received from AT&T because of AT&T's treatment by its upstream supplier, Verizon–that is, injury as an indirect purchaser two steps downstream from Verizon. App. 28a. Nevertheless, the court found standing because AT&T, the direct purchaser, was not "solely" a customer of Verizon, but "also a competitor." App. 26a. It relied on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), even while describing the plaintiff there as directly denied payment by the defendant, with no intermediate step making the injury indirect. App. 26a-27a.

On the merits, the court identified two bases for respondent's satisfying the anticompetitive-conduct requirement of Section 2. App. 28a-30a. The first was "essential

facilities": the court held that "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." App. 29a, 29a-30a. The second was "monopoly leveraging": the court found sufficient the allegations that Verizon (a) has monopoly power in "a wholesale market in which it sells access to the local loop" (though the access is sold under legal compulsion) and (b) "used that power *to gain a competitive advantage* in a retail market in which telecommunications carriers sell local phone service to consumers," injuring respondent. App. 30a (emphasis added).

The court immediately recognized that, "[i]n *Goldwasser*, the Seventh Circuit dismissed similar allegations" (also brought by consumers). App. 31a. In reaching an opposite conclusion, the Second Circuit nowhere discussed *Goldwasser*'s basic ruling that the "unadorned" Sherman Act, of its own force, does not impose duties to provide assistance to rivals of the very sort alleged both here and there. 222 F.3d at 399-400. Instead, the Second Circuit, having already found actionable conduct, simply reasoned that the 1996 Act granted no implicit immunity from the Sherman Act, there being no "plain repugnancy" between the statutes. App. 31a-33a.

The Second Circuit, not recognizing the novelty of the antitrust duty it created, never considered *Goldwasser*'s analysis of the 1996 Act as a reason for refusing to create such a new Section 2 duty in the first place. Rather, the Court generally discussed *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), as allowing an antitrust claim despite a regulatory regime, though without addressing the differences between that regime and the 1996 Act. App. 34a-35a. In response to *Goldwasser*'s explanation that a new Sherman Act duty "would add nothing to the oversight already available under the 1996 law" in preventing violations (*i.e.*,

actual non-transitory harm to competition overall, as opposed to quickly remedied harm to particular competitors), 222 F.3d at 401, the Second Circuit made only a point about *relief* divorced from whether an antitrust *violation* has occurred: The Second Circuit repeatedly emphasized that allowing this suit was important in "affording the consumer compensation that the Telecommunications Act does not provide." App. 33a; *see* App. 35a, 36a, 37a n.18. In response to *Goldwasser*'s explanation that allowing Sherman Act suits would impair the 1996 Act regime (222 F.3d at 401), the Second Circuit saw no such problem with damages relief (treble damages, in a class action). App. 36a-39a.

REASONS FOR GRANTING THE PETITION

The Second Circuit decision involves important legal issues being litigated in numerous cases across the Nation, creates conflicts with the law of other circuits, and sharply departs from important limits on antitrust duties and on standing to sue. The broadening of unilateral "sharing" duties under Section 2 and the expansion of standing threaten massive new litigation, as already shown by the filing of some 25 new class actions following this decision. For the telecommunications industry, the ruling throws open the door to costly treble-damages, jury-decided litigation over the complex details of assistance that are already under the superintendence of regulators and are intrinsically dispute-generating, as numerous new competitors press demands for more favorable prices and other terms under untested new standards. More generally, the Second Circuit decision presents new conduct-influencing burdens and risks for firms in any market where monopoly allegations can be advanced and class-action lawyers see an opportunity.

The Second Circuit's expansion of antitrust sharing duties unavoidably embraces what other courts have until now firmly resisted: the transformation of federal antitrust judges and juries into regulatory agencies deciding what kinds and

amounts of sharing are required and at what prices. Other courts' resistance to such assistance duties respects a vital antitrust line–between firms' interference with rivals' independent competitive efforts, which antitrust law targets, and provision of affirmative assistance to rivals, which has long been the province of regulation (and of antitrust suspicion, not encouragement). The Second Circuit decision erases that line, creating duties that are fundamentally contrary to normal competitive interests and intrinsically fraught with investment-deterring risks, and assigning courts intractable tasks involving technologically and economically complex and uncertain judgments. And the decision takes this unprecedented step despite the intense control of the very assistance at issue by expert, flexible regulators under the 1996 Act's comprehensive regime, designed to replace the prior *judicial* regulation under the AT&T Breakup Decree. It was the 1996 Act that created the basis for such demands for assistance. This Court should correct the Second Circuit's conversion of these claims into antitrust claims by its alteration of Section 2 law.

The Court should also review the Second Circuit's expansion of standing under the Sherman Act and Communications Act. The bedrock principle that standing is restricted to direct victims, asserting their own legal rights, serves the vital function of confining controversies to allow for their efficient resolution. The Second Circuit decision, abrogating both parts of this principle, invites class actions that transform the judicial process. The ruling permits suits by all indirect purchasers, seemingly anyone in the Nation with a telephone, and the re-opening by third parties of disputes already resolved between the direct parties through their agreed-on forum. This prescription for proliferation of lawsuits cannot stand consistent with recognized limits on standing.

I. THE EXPANSION OF ANTITRUST DUTIES SHOULD BE REVIEWED

The Second Circuit's ruling on Section 2 of the Sherman Act, in conflict with other circuits' decisions, wrongly decides two important substantive issues. First, it vastly expands unilateral Section 2 duties to render affirmative assistance to rivals, contrary to strict limits recognized elsewhere and, most pointedly, contrary to the Seventh Circuit's *Goldwasser* decision rejecting claims indistinguishable from the claims here. Second, the Second Circuit decision endorses monopoly leveraging as a Section 2 theory, contrary to other circuits' holdings. The Second Circuit decision also presents an important issue, and conflict, regarding reliance on regulation in formulating (not just overriding) antitrust duties.

A. The Second Circuit Decision, In Conflict With The Seventh Circuit Holding In *Goldwasser* And With Doctrinal Limits Recognized In Other Circuits, Improperly Expands Section 2 Duties Of Affirmative Assistance

1. The Second Circuit's decision squarely conflicts with the Seventh Circuit's decision in *Goldwasser*. In an opinion by Judge Diane Wood, an antitrust law professor and former Antitrust Division official, the Seventh Circuit required dismissal of a consumer complaint making the very same kind of allegations that respondent makes here–intentionally inadequate, discriminatory assistance on the matters covered by Section 251 of the Communications Act. 222 F.3d at 400-01. The Seventh Circuit specifically reasoned that the asserted duties–not *because* they were Section 251 duties, but because of what in substance they demanded–are "precisely the kinds of affirmative duties to help one's competitors that * * * do not exist under the unadorned antitrust laws." *Id.* at

400.[6] Then, against the background of that pure Sherman Act ruling, the Seventh Circuit explained that there were particularly strong reasons for refusing to recognize new such duties as an antitrust matter: the "antitrust laws would add nothing to the oversight already available under the 1996 law," and adding antitrust duties would not be compatible with the "elaborate system of negotiated agreements and enforcement established by the 1996 Act" for the very matters at issue. *Id.* at 401. The Second Circuit decision here–along with the recent Eleventh Circuit decision following it and disagreeing with *Goldwasser*'s Section 2 ruling–is in irreconcilable conflict with *Goldwasser*.[7]

Goldwasser is merely the most squarely on-point example of a wide range of decisions that apply sharp doctrinal limits on unilateral duties to render assistance to rivals, including under the essential facilities doctrine–limits disregarded in the Second Circuit decision. *First*: The Second Circuit decision

---

[6] Among the precedents the Seventh Circuit cited in support of *rejecting* Section 2 coverage of the asserted duties was its own 1983 decision in *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1149 (7th Cir. 1983). At the cited page, the *MCI* court, having upheld a claim for local interconnection to enable long-distance competition, rejected a claim for access to AT&T's long-distance network to speed up long-distance competition. *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) ("AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means."). It is the *rejected* (same-level, same-market) claim in *MCI* that is closer to claims, like respondent's, involving assistance under the 1996 Act.

[7] *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *rehearing petition pending*. Unlike the Second and Eleventh Circuits, most district courts have "dismissed antitrust claims based on conduct subject to the 1996 Act." *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F.Supp.2d 123, 130 n.19 (D.D.C. 2002) (citing cases), *appeal pending*.

recognizes a Section 2 duty to sell end-user services, at a discount, to mere resellers. But a Section 2 duty to sell to such "non-competitive middlem[e]n" has been firmly rejected elsewhere. *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980); *see HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877-78 (6th Cir. 1991); *see also MCI*, 708 F.2d at 1149 (discussed in note 6, *supra*: rejecting duty on AT&T to resell long-distance transport service to MCI).

Second: The Second Circuit decision imposes an *antitrust* duty to change one's business—here, to sell "access" to the local loop on "reasonable" terms. (The 1996 Act compelled such sales, which had not been made voluntarily, and the Act did not expand *antitrust* duties. *See* 47 U.S.C. § 152 note (savings clause).) By contrast, in *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 (4th Cir. 1991), the Fourth Circuit, after noting the usual articulation of the essential-facilities doctrine as requiring access only where "feasible," held that access to train *track* was not feasible because the defendant railroad was not in the business of renting out its track. The Second Circuit holding is incompatible with the ruling that a defendant has no duty to change its business of providing end-user service into one of renting facilities to intermediaries providing end-user service. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992) (no duty of pipeline to transport gas instead of selling its own).

Third: The Second Circuit decision allows essential-facility challenges to the *terms* of access, without *denial* of access or cessation of competition. But in *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996), the Third Circuit affirmed rejection of an essential-facilities claim because there was no denial of use of the facility, only a dispute about the reasonableness of terms. *See also Alaska*

Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 545-46 (9th Cir. 1991).

Fourth: The Second Circuit decision allows essential-facility claims even for unbundled network element loop rental, where the renter's use is exclusive, displacing's the defendant's. *See* note 4, *supra*. But the Seventh and Ninth Circuits have recognized that a defendant has no essential-facility duty to give "preferential access" or to "abandon its facilities." *MCI*, 708 F.2d at 1133; *cf. City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992) (Section 2 does not require defendant "to cease using its own facility so that [a rival] can begin using it").

2. The circuits' repeated recognition of principles strictly limiting any unilateral duty to assist rivals, together with the near-absence of any actual holding of essential-facilities liability (*see* pp. 16-17, *infra*), reflects fundamental antitrust law and policy. Antitrust law targets positive hindrance of rivals' independent efforts, not insufficient affirmative assistance to rivals. *See* S. Breyer, *Regulation and Its Reform* 157 (1982) (The antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do."); *Burris*, 935 F.2d at 1484 (negative/affirmative line).[8] Indeed, Section 2 does not require general dismantling of lawful monopolies, *see United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (Section 2 "does not compel competition"), yet that would be the result of a general duty to support mere resale, because separation of retailing (marketing) from production is almost always possible.

[8] The distinction between failure to render assistance and active interference in others' independent actions is fundamental elsewhere in the law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (relying on same line in holding that failure to provide assistance is not "deprivation" under Due Process Clause).

Familiar antitrust policies, both substantive and institutional, must drastically limit any court-administered duties of assistance. *Substantively*: Forced access reduces the incentives that antitrust law centrally encourages–to invest in rival facilities to lower cost and thus raise output. Incumbents will invest less if they must share, and new entrants will invest less where sharing is easier and less risky. Such effects, which are not amenable to reliable judicial assessment, would in fact render sharing of a monopoly, if voluntary, suspect under Section 1. *Institutionally*: Courts (juries) are unsuited to, and have traditionally avoided, the inevitable task of defining the "proper" price and other terms of forced access. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.) ("antitrust courts normally avoid direct price administration"). Neither problem is avoided by limiting the remedy to treble damages, as the Second Circuit suggested. App. 35a-39a. That powerful weapon designedly regulates conduct and thus affects investment incentives; and judicial assessment of the terms of assistance is unavoidable to determine *liability* in the first place.

For such reasons, "scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access, and accompanying judicial price setting." *United States Telecom Ass'n*, 290 F.3d at 424, 427 n.4; *see* IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 770e, 773a, at 167-169, 196-98 (2d ed. 2002). Indeed, leading commentators have urged abolition of the essential-facilities doctrine.[9] The

[9] IIIA Areeda & Hovenkamp, ¶ 771c at 173 ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned."); Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U. L.J. 433, 479-80 (1987) (Gregory Werden, long-time Antitrust Division economist and prolific author on antitrust law and economics, wrote: "The Supreme Court has never acknowledged the essential facility doctrine. The Court's abstention was wise. The lower courts should reject the doctrine.").

comparative advantage of regulatory agencies–with both expertise and the flexibility repeatedly to adjust the balance between too much assistance and too little–is plain. In the 1996 Act, Congress assigned the delicate balancing task to regulatory agencies. The duties should not now be converted into antitrust obligations defined by juries.

3. The Second Circuit's antitrust ruling not only conflicts with other circuits' expressed limits on affirmative-assistance duties to rivals; it extends such duties beyond any previous holding of liability. This Court has never recognized the essential facilities doctrine. *See Iowa Utils.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And there has scarcely ever been liability for wholly unilateral action–and then only in very narrow circumstances sharply different from the circumstances in this and other cases asserting access duties like those under the 1996 Act.[10]

The Seventh Circuit's 1983 *MCI* case is the rare such case, but its special circumstances are reflected in the fact that the Seventh Circuit in *Goldwasser* cited *MCI* to *reject* an assistance claim like respondent's. The defendant (AT&T) had been voluntarily providing local interconnection to others; the duty was limited to providing *local* interconnection for *long-distance* service, two voluntarily separated markets using

[10] Importantly, both *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), to which "essential facilities" is sometimes traced, and *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), which seems to have introduced the term, involved concerted, not unilateral, action. In this context, as in antitrust law generally, the distinction is basic. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984); IIIA Areeda & Hovenkamp, ¶ 772d, at 192-93 (concerted/unilateral distinction critical); Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989) ("concerted action is exceptional, whereas unilateral action is omnipresent"; "concerted exclusion is much easier to remedy," by inclusion on nondiscriminatory terms; "admission to a joint venture is a one-time remedy that does not require day-to-day control" by the courts).

separate facilities; the local monopoly was protected by law against entry and subject to traditional rate regulation guaranteeing recovery of local-facility investments; MCI asked for no displacement of AT&T's use of its facilities; and MCI challenged flat-out terminations and refusals, not mere unreasonableness of terms. *See* 708 F.2d at 1093, 1095, 1133.[11] In that no-longer-present combination of circumstances, forced sharing might not have deterred investment by incumbents (being protected by the local monopoly and rate regulation) or local rivals (being legally forbidden anyway); and the court, including the jury, was not called on to play the regulatory role of price-and-term administration. The inapplicability of that essential-facility analysis to the quite different present context, involving the access duties created under the 1996 Act, has been well recognized even by a principal proponent of 1996 Act rights.[12] The "access to the

[11] Two decisions of this Court cited by the Second Circuit, though not "essential facilities" cases, involved circumstances clearly not present here. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985), involved a *termination* of a voluntarily created arrangement implemented through existing sales mechanisms (ski ticket sales offices), not deficiencies in creating a new arrangement through massive new ordering systems; it also involved a classic nonduplicable, natural-resource asset (a mountain) and, indeed, elimination of a distinct product (multi-mountain pass), not a claim to force a wholesale/retail separation, let alone at discounted prices. Likewise, in *Otter Tail*, 410 U.S. at 371, 378, the defendant power wholesaler was in fact wheeling power for other unaffiliated retailers; its "facilities depended upon exclusive government grants," as in *MCI* (L. Sullivan & W. Grimes, *The Law of Antitrust: An Integrated Handbook* 114 (2000)), but which are now barred (§ 253); and the only issue was a flat-out refusal of access, not terms whose adequacy would be tested in court.

[12] In 1999, AT&T, urging the FCC to reject an "essential facilities" approach to applying Section 251 access duties, explained that the doctrine did *not* reach these new access duties:

- The doctrine "assumes the continuation of a monopoly in the defendant's core market—the very circumstance Section 251 seeks to end."

local loop" demanded now was *not* voluntarily provided before 1996; this claim *is* about local markets, where entry is now positively invited, investments are no longer guaranteed recovery, and rival facilities are encouraged; and the specific terms of access are precisely what judges and juries are being asked to determine.

4. The Second Circuit's error in recognizing a broad new duty of affirmative assistance is a matter of Sherman Act law itself, but the 1996 Act bolsters the reasons for rejecting the Second Circuit's new duty. Prompt regulatory decision on the very claims of access at issue here is undisputedly

---

- The doctrine "has been narrowly construed, and only very rarely applied, by the courts"; more generally, Section 2 duties are "[i]n sharp contrast to *** [Section 251's] obligation to provide non-discriminatory access to network elements on an unbundled basis ***. The purpose of Section 251 is to eliminate local exchange monopolies that were *not* declared unlawful under the antitrust laws, and that were *not* held to be required under the essential facilities doctrine (or any other antitrust doctrine) to provide their potential local competitors with access to their facilities."
- The doctrine "has never been used to require a monopolist to provide access to an essential facility simply to permit others to compete in the same market" and "cannot be used to pry open regulated monopolies to competition. Instead, that objective is the traditional province of agency-adopted regulation[.] *** [A] nondiscriminatory access mandate generally requires continuing regulation of the terms and conditions on which the monopolist provides access to competitors—a task 'for which both the federal courts and the antitrust litigation process are extremely ill-suited' ***."

Comments of AT&T at 47 & n.77, 50, 51-52, in *Local Competition* proceeding, CC Docket No. 96-98 (filed May 26, 1999), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6007444999. The FCC embraced the analysis, noting particularly that the 1996 Act requires UNE access at "cost-based rates, whereas the essential facilities doctrine allows monopolists to continue charging monopoly rates for use of their facilities." *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 60 (1999), *remanded* in *United States Telecom Ass'n*, *supra*.

available under the 1996 Act, in sharp contrast to the situation in *MCI* and in *Otter Tail*.[13] That fact, plain on the face of the statute, eliminates the risk that a truly competition-harming problem would escape rapid correction (the problem in this case was corrected in a few months). And the public record of the comprehensive, aggressive implementation of the 1996 Act regime is beyond dispute.

In these circumstances, the particular regulatory regime is an important reason for not expanding antitrust sharing duties. *Goldwasser* so held, explaining that, with the 1996 Act regime in place, there was no real potential for true market harms for antitrust to address. *See* 222 F.3d at 401. And the principle is central to the First Circuit decision in *Town of Concord*. Relying critically on the proposition that a regulatory regime, even if not providing immunity from otherwise-applicable antitrust duties, can play a central role in determining whether there is a cognizable antitrust duty in the first place, the First Circuit reversed a verdict and rejected a Section 2 claim of price squeeze, as a matter of law, in an industry where both the wholesale and retail levels were regulated, explaining that regulation "dramatically alters the calculus of antitrust harms and benefits" and "significantly diminishes the likelihood of major antitrust harm," so that "the relevant antitrust considerations differ significantly, in

---

[13] Regarding *Otter Tail*, the Second Circuit itself mentioned this critical difference (which determines whether the regime puts the "access" keys in competitors' pockets). In *Otter Tail*, "the Federal Power Commission was *not* permitted under the Federal Power Act to order" the access at issue (App. 35a (emphasis added)), whereas such regulatory power under the 1996 Act is undisputed, and indeed the 1996 Act guarantees a prompt, judicially reviewable ruling on access claims. *See* IIIA Areeda & Hovenkamp, ¶ 722, at 181. Regarding *MCI*, the significant regulatory fact was that AT&T could decide what it would do or not do without initial regulatory review and no guarantee of prompt regulatory review at all. *MCI*, 708 F.2d at 1093-99, 1103 (reciting decade-long proceedings in FCC).

degree and in kind." 915 F.2d at 25, 28.[14] The Second Circuit's only response to *Town of Concord* was to state that the decision came after trial. App. 37a n.17. But *Town of Concord* hardly relies on any *trial* on the effectiveness of the regulatory regime; to the contrary, the opinion relies entirely on publicly available legal and economic materials, with no citation to any record of a regulatory-effectiveness trial. The same approach should apply here.

Treating the 1996 Act's comprehensive regime as counting against adoption of a new antitrust duty accords with general principles of statutory construction. Wholly apart from any "implied repeal" principle, this Court has looked to later-enacted, specific statutes to reject invocations of earlier, more general statutes that had not previously been extended to the situation (and did not unavoidably cover it) where there was potential for incompatibility. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (rejecting broad reading of 42 U.S.C. § 1981 to avoid "undermin[ing] the detailed and well-crafted procedures" of Title VII); *United States v. Fausto*, 484 U.S. 439, 453 (1988); *cf. J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 601 n.9 (2001) (discussing *Romani*). The judicial duty to harmonize statutes where possible supports *declining*

[14] The rationale has been recognized elsewhere as well. *See, e.g., Almeda Mall*, 615 F.2d at 354; *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.) ("[T]he proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate. * * * '[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.'") (quoting Areeda treatise), *modified*, 1982 WL 11277 (9th Cir.).

to expand an old, general provision in ways that would interfere with the newer, more specific one. Indeed, the 1996 Act's savings clause (47 U.S.C. § 152 note, App. 103a) indicates that previously recognized limits on Section 2 assistance duties were *not* altered by the Act's creation of new assistance obligations.

Here, a new antitrust duty, administered through discrete jury determinations and treble-damages awards, could readily impair the 1996 Act regime. As just one example: That regime contemplates a *balance* by FCC and state policymakers to ensure, among other things, that too much sharing and dependency do not actually reduce independent investment, *see* note 1, *supra*, and the task of maintaining and adjusting that balance cannot be performed if juries may impose treble-damages liability judging "reasonableness." More generally, the decisionmaking of all participants in regulatory processes–including the regulators, the incumbents, the competitors–will be skewed by the availability of antitrust liability, and treble damages, on the very same topics. *See Goldwasser*, 222 F.3d at 401; *Covad*, 201 F. Supp. 2d at 133-34.

B. The Second Circuit Decision, In Conflict With Other Circuits, Improperly Endorses "Monopoly Leveraging" As A Section 2 Theory

The Second Circuit decision presents a conflict over "monopoly leveraging" as a basis for Section 2 liability. Two other circuits have squarely rejected monopoly leveraging, while one other has embraced it. *Compare Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992) *and Alaska Airlines*, 948 F.2d at 548 (9th Cir.) *with Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135, 136-38 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989). Still other circuits have criticized monopoly leveraging in rejecting claims on grounds obviating the need to decide the issue. *See Intergraph Corp.*

v. Intel Corp., 195 F.3d 1346, 1359-60 (Fed. Cir. 1999); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam; panel including now-Justice Ginsburg); *see also Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198, 206 n.16 (5th Cir. 2000) (recognizing "split"); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 63 F.3d 1540, 1551 n.8 (10th Cir. 1995) (same).

Using a monopoly to "gain a competitive advantage" (App. 30a) provides no separate ground of Section 2 liability for unilateral conduct, which the statute condemns only when it amounts to monopolizing or attempting to monopolize a market. Those requirements serve an important antitrust policy: protecting against consumer-harming challenges to superior efficiency from integration or superior aggressiveness. This Court, accordingly, has declared that Section 2 condemns unilateral conduct "*only* when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (emphasis added).[15] The Second Circuit's resuscitation of "monopoly leveraging" cannot be squared with *Spectrum Sports* or the statute.

[15] It is longstanding policy of the Antitrust Division not to recognize monopoly-leveraging claims. *See* William J. Kolasky, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, *North Atlantic Competition Policy: Converging Toward What?*, address dated May 17, 2002 ("[I]t is not unlawful for a firm with a monopoly in one market to use its monopoly power in that market to gain a competitive advantage in neighboring markets, unless by so doing it serves either to maintain its existing monopoly or to create a dangerous probability of gaining a monopoly in the adjacent market as well."), available at http://www.usdoj.gov/atr/public/speeches/11153.pdf.

II. THE STANDING RULINGS SHOULD BE REVIEWED

Respondent and the plaintiff class were not customers of Verizon, but customers of Verizon's customer AT&T, *i.e.*, indirect purchasers, and they complain of harm (to their AT&T phone service) derivative of harm to the direct customer. The Second Circuit nevertheless found standing, in conflict with this Court's and other circuits' rulings, even where (for the Communications Act) only AT&T's substantive legal rights were being invoked. The ruling abrogates both the requirement of *direct* injury and the normal bar on third-party standing, and it promises a dangerous expansion of litigation, not only but particularly in the communications context: for the first time, incumbent carriers (which by law must engage in massively detailed and complex sales to their competitors) must bear the burden of separate suits from their customer's customers (here filed as a class action), even where the carrier and its direct customer have committed disputes to cost-saving non-judicial resolution. The net result is virtual universal standing, contrary to *United States v. Western Elec. Co.*, 900 F.2d 283, 310 (D.C. Cir. 1990) (rejecting consumer standing, as virtually universal, to challenge AT&T decree modifications).

The Second Circuit's recognition of both antitrust standing and Communications Act standing violates the longstanding principle that federal statutes are generally read not to afford standing to those injured only indirectly. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, J.) ("The general tendency of the law * * * is not to go beyond the first step."). This "requirement" demands a "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover." *Holmes v. Securities*

Investor Prot. Corp., 503 U.S. 258, 268-69 (1992). The requirement is embodied in, not abrogated by, the standard "any person * * * injured" language of suit-authorizing provisions for, *e.g.*, RICO, 18 U.S.C. § 1964(c), and the antitrust laws, 15 U.S.C. § 15. *Holmes*, 503 U.S. at 267 n.13; *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983) (*AGC*) (citing *Darnell-Taenzer*). It is specifically reflected in the indirect-purchaser bar in antitrust law. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The language of Communications Act §§ 206 and 207 is no different. Thus, the alleged injury here should have been barred as indirect, deriving from harm to the direct customer.[16]

For antitrust standing, the Second Circuit noted that the direct customer, AT&T, also competes with Verizon, but that dual status does not change indirectness of the asserted injury into directness. The fact remains that respondent's sole claimed injury (poor local phone service *from AT&T* caused by Verizon's allegedly deficient assistance to AT&T) was derivative of harm to AT&T. Moreover, although the Second Circuit relied on this Court's decision in *Blue Shield v. McCready*, that decision does not depart in statement or

[16] Other factors reinforce indirectness as a bar here, and indicate why any essential-facilities claims are properly limited to the competitor/customer. The direct customer is a better plaintiff to challenge any deficient assistance; there are obvious difficulties in determining how much if any of the alleged deficiency was passed through by the direct customer and how much of the compensation received by the direct customer (AT&T) was then passed through; and the asserted harm–lost business from impaired telephone service–is intrinsically speculative. *See Holmes*, 503 U.S. at 269-70; *AGC*, 459 U.S. at 541. Even the indirect-purchaser bar cannot be limited to overcharges, because reduced quality is inseparable from excessive prices. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993).

holding from the direct-causation requirement: the plaintiff's injury was *direct*–defendant refused to pay her. And the ruling here conflicts with decisions of other circuits denying antitrust standing to customer's customers asserting indirect injury.[17]

For the Communications Act, the Second Circuit's discussion simply confused "distinctness" of an alleged loss with the required directness of the causal connection. That confusion leaves "directness" with no discernible meaning, for different parties' losses will routinely be "distinct." Indeed, the Second Circuit's ruling conflicts with this Court's decisions finding distinct injuries nevertheless indirect.[18]

The Second Circuit's allowance of standing under Communications Act §§ 206 and 207 suffers from a second, independent flaw. A bedrock prudential standing rule is that persons injured by defendant's conduct can assert only their own legal rights, not another person's. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Second Circuit holding that the rule is overriden by run-of-the-mill language authorizing

[17] *See Laurel Sand*, 924 F.2d at 543-44 (4th Cir.) (customer of railroad seeking trackage rights from defendant railroad denied standing); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966-67 (3d Cir. 1983) (where plaintiff customer injured through retail dealer restricted by upstream defendant manufacturer, no standing even to challenge conspiracy between manufacturer and other retailers competing with plaintiff); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979) (where plaintiffs (Durham, Watercraft) injured as business customers of distributor ESI, by injury to ESI inflicted by its suppliers and their co-conspirators, no standing); *see also Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1520-21 (11th Cir. 1990) (buyer from manufacturer denied standing to sue supplier of credit to manufacturer).

[18] *See Holmes*, 503 U.S. at 262-63 (conspiracy caused broker-dealers' losses (excessive prices), derivatively causing harm to customers (loss of assets)); *AGC*, 459 U.S. at 540-41 (conspiracy coerced landowners to choose nonunion contractors, derivatively harming union (lost dues)).

injured persons to sue (as in §§ 206, 207) leaves virtually nothing to the background rule, contrary to other circuits' reliance on it to deny standing under similarly broad statutes. *E.g.*, *Flittie v. Solem*, 827 F.2d 276 (8th Cir. 1987) (42 U.S.C. § 1983); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308-09 (9th Cir. 1982) (42 U.S.C. §§ 1981-1983, 2000d).

The court of appeals cited no distinctive language, and no legislative history, to support its allowance of third-party standing. It cited a statement in *L.T. Barringer*, 319 U.S. at 13, about the Interstate Commerce Act (ICA), but the statement was *not* about the cause-of-action provision of the ICA at all (§ 8), the predecessor of Communications Act §§ 206, 207, but about a *substantive* ICA provision, and did not purport to authorize suits on others' substantive rights. To the contrary, this Court in *Darnell-Taenzer*, an ICA § 8 case, ruled that a customer is "the only one" who can sue to vindicate its ICA rights.[19] The same conclusion should apply here. *See Central Office*, 524 U.S. at 221-22, 227 (drawing on ICA in Communications Act case).

III. THE ISSUES PRESENTED SHOULD BE REVIEWED NOW

The Second Circuit's dramatic change in legal standards governs all firms subject to monopoly accusations. The legal issues presented are capable of resolution on the present record, and the recurrence of and conflicts over the issues, and the broad sweep of the rulings, substantive and standing, support immediate review. The Second Circuit's rulings will harmfully skew marketplace behavior while they remain the governing law in the commercially important Second Circuit, where many firms can be sued.

---

[19] *Darnell-Taenzer*, 245 U.S. at 534 ("The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.").

A. No Further Record Is Needed

The complaint rests entirely on alleged deficient provision of affirmative assistance on precisely the subjects covered by the 1996 Act. It is a legal question whether the allegations, if proved, could constitute unlawful conduct under Section 2 of the Sherman Act [20]; indeed, that is the precise legal question that the Seventh Circuit decided in *Goldwasser* on a motion to dismiss. It is also a legal question whether a customer's customer may rely on its derivative injury, and the direct customer's rights, to sue; indeed, in *AGC*, this Court found lack of standing on a motion to dismiss.

No further factual materials are needed to conclude that the complaint is legally insufficient. The relevant materials for analyzing the doctrinal and policy questions—including the limits on prior duties to deal with rivals and the reasons for those limits, as well as the critical features of the relevant regulatory context, and the law on customer's customer standing—require no factual record development. *Cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (ordering dismissal of sole antitrust theory presented to Court); *AGC*, *supra* (dismissal); *United States v. National Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694 (1975) (dismissal, based on legal and publicly available materials). And the sufficiency of the record to decide the legal questions actually presented cannot be defeated by positing different, unmade allegations that might require further factual development. *AGC*, 459 U.S. at

---

[20] *See SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (whether a type of conduct is anticompetitive is a question of law); II Areeda & Hovenkamp, ¶ 307c at 68-72 (2d ed. 2000); Areeda, *Essential Facilities*, 58 Antitrust L.J. at 851 (*legal* determination required in defining any duty of assistance to rivals: "Ad hoc policy decisions by juries provide no guidance to business actors, subject similar firms or markets to different rules, and lodge national economic policy in unqualified hands. * * * [J]udges, not juries, must decide what kinds of facilities one is entitled to keep for oneself.").

526 ("It is not * * * proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.").

B. Deferring Review Would Create Substantial Harm

Until corrected, the Second Circuit's broad legal standards will not only leave disuniformity among the circuits but foster burdensome and unjustified litigation, with well-recognized harms. Antitrust cases are notoriously expensive, even considered one at a time.[21] Here, the litigation is multiplying, and likely to proliferate further, against Verizon and other incumbent local telephone companies,[22] using the new weapons for suing over the routine disputes about the complex terms of assistance provided in hundreds of

---

[21] *AGC*, 459 U.S. at 528 n.17 (demanding sufficient allegations before allowing "potentially massive factual controversy to proceed"); *DM Research, Inc. v. College of Amer. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); Werden, 32 St. Louis U.L.J. at 474 ("Section 2 suits are very expensive").

[22] Following the Second Circuit's decision, Verizon and other incumbent local telephone companies have been subjected to no fewer than 25 class actions in New York, Connecticut, Georgia, and Colorado, adding to pending suits by disappointed competitors in other jurisdictions. The litigation will predictably mount. "The goal * * * is to turn the Bells into the next asbestos or tobacco companies." Jeremy Feiler, *Verizon Battles Antitrust Suits*, Phil. Bus. J., July 12, 2002, at 3 (quoting Daniel Berninger, Telecom Antitrust Intelligence Report); *see* Editorial, *Son of Frankentobacco*, Wall St. J., Aug. 23, 2002, at A12 ("'The people that will drive this process will be, essentially, ambulance chasers,' Pulver.com's Dan Berninger recently boasted * * *. 'The same people that drive malpractice and asbestos suits.'").

agreements under the 1996 Act. The decision in this case has already been followed outside the Second Circuit,[23] and beyond the telecommunications industry.[24] And all of this litigation is not only costly to the parties and legal system, but deeply risky for any business, if standards are no more predictable in their application than "reasonable access" (App. 29a) or "'reasonable'" discrimination (App. 12a), as determined by juries.

The very threat of these costs and risks will harm the efficiency goals of antitrust and communications policy. As a former Antitrust Division head has explained, risky and burdensome antitrust suits can "have significant anticompetitive consequences."[25] "[I]t is not always necessary to win cases in order to blunt a rival's competitive weapons. Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors."[26] The same anticipated result can be exploited by the short-term perspective of class-action plaintiffs and their counsel, harming investments with longer term competitive benefits. The Second Circuit ruling will distort the

---

[23] *See, e.g., Covad v. BellSouth, supra* (11th Cir.); *Ohio Bell Tel. Co. v. CoreComm Newco, Inc.*, 214 F.Supp.2d 810, 815-18 (N.D. Ohio 2002).

[24] The decision here was relied on to allow 16 consumer class actions to go forward against United Parcel Service on essential-facilities and monopoly-leveraging theories, *In re EVIC Class Action Litigation*, 2002 WL 1766554, at *12-*14 (S.D.N.Y. July 31, 2002), and to permit the Yankees baseball channel to challenge terms of access offered by a cable company, *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 2002 WL 31010490, at *10-*13 (S.D.N.Y. Sept. 4, 2002).

[25] Snyder & Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 552 (1991).

[26] Baumol and Ordover, *Use of Antitrust To Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985); *see id.* at 264 ("Mere accusation and trial subjects the defendant firm to enormous expenses and even greater ex ante risks of an expensive adverse decision, even if it transpires ex post on the basis of convincing evidence that it is completely innocent.").

marketplace conduct of all those subject to the rulings—not just in the telecommunications industry (where excess assistance furnished by incumbents to avoid the costs and risks of antitrust cases will drain funds from otherwise needed investments and deter rivals' independent investments), but in other industries where monopoly (or attempted monopoly or leveraging) accusations can be made. This Court can and should review and correct the Second Circuit's rulings now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN
TODD & EVANS, PLLC
1615 M Street, NW
Washington, DC 20036
(202) 326-7900

HENRY B. GUTMAN
SIMPSON THACHER
& BARTLETT
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

JOHN THORNE
Counsel of Record
VERIZON COMMUNICATIONS INC.
1515 N. Courthouse Rd.
Arlington, VA 22201
(703) 351-3900

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, NW
Suite 800
Washington, DC 20036
(202) 775-0184

November 1, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 01-7746

LAW OFFICES OF CURTIS v. TRINKO, L.L.P.,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

BELL ATLANTIC CORPORATION,
Defendant-Appellee.

Argued: Jan. 10, 2002.
Decided: June 20, 2002.
Amended: Aug. 14, 2002.
Errata Filed: Aug. 30, 2002.

Before: SACK, KATZMANN, and FLETCHER,* *Circuit Judges*.

Judge SACK concurs in part and dissents in part in a separate opinion.

KATZMANN, *Circuit Judge*.

This is an appeal of a dismissal of a class action brought on behalf of a class consisting of customers who received local phone service in the region served by Bell Atlantic from a company other than Bell Atlantic.[1] In recent years, the federal government has changed its policy with respect to the structure of local phone service markets, which had been

---

* The Honorable Betty Fletcher, Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

[1] Bell Atlantic later merged with GTE Corporation to form Verizon Communications.

controlled by state-sanctioned local monopolies. Congress sought to introduce competition to those markets by passing the Telecommunications Act of 1996 (the "Telecommunications Act"), Pub.L. 104-104, 110 Stat. 56, which amended the Communications Act of 1934 (the "Communications Act"), 47 U.S.C. § 151, *et seq*. The Telecommunications Act requires the carrier with the local phone service monopoly to provide competitors with access to its local network—infrastructure necessary to provide local service that is expensive to duplicate. The Telecommunications Act also sets forth procedures by which telecommunications carriers can negotiate an interconnection agreement, which provides for such access, that must ultimately be approved by state regulators.

The plaintiff claims that it was damaged when the defendant, Bell Atlantic, denied the customers of AT & T, the plaintiff's local phone service provider, equal access to its local network. The plaintiff filed an action alleging that this behavior: (1) violated section 202(a) of the Communications Act; (2) violated subsections (b) and (c) of section 251 of the Telecommunications Act; (3) violated section 2 of the Sherman Antitrust Act (the "Sherman Act"), 15 U.S.C. § 2; and (4) was a tortious interference with contract. The plaintiff sought damages and injunctive relief for the alleged violations of section 202(a) and subsections (b) and (c) of section 251 pursuant to sections 206 and 207 of the Communications Act. It also sought damages and injunctive relief for the alleged violation of section 2 of the Sherman Act pursuant to the Clayton Act, 15 U.S.C. § 15.

The defendant primarily contended and maintains on appeal that the plaintiff's section 202(a) and 251 claims should be dismissed because the plaintiff is not asserting its own rights but is asserting rights that belong to AT & T. The defendant argues that the complaint only alleges a breach of its interconnection agreement with AT & T and that such a breach should be remedied through the administrative

process. The defendant claims that allowing an antitrust action based on the plaintiff's allegations would disrupt the regulatory process established by the Telecommunications Act. The district court essentially agreed with these arguments and dismissed the plaintiff's action in its entirety. *See Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F.Supp.2d 738 (S.D.N.Y. 2000).

For the following reasons, we affirm in part, vacate in part, and remand for further proceedings.

BACKGROUND

We review the district court's decision granting the defendant's motion to dismiss *de novo*, taking all factual allegations in the amended complaint as true and construing all reasonable inferences in favor of the plaintiff. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Conboy v. AT & T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001).

I. The Market for Local Phone Service and the Telecommunications Act

Prior to 1982, AT & T had monopolies in the markets for long-distance phone service, local phone service, and telephone equipment. In that year, AT & T settled an antitrust suit by the United States and agreed to a consent decree that split it from its local subsidiaries in order to encourage competition in the long-distance and equipment markets. In contrast, local phone service markets were left in the hands of AT & T's former local subsidiaries, which were regulated as monopolies by the states and prohibited from entering the long-distance markets. The rationale for allowing monopolies in the local phone service market was the belief that having more than one local provider would lead to unwarranted duplication in the physical connecting wires through which local calls are transmitted. *See AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 413-14 (1999) (Breyer, J., concurring in part, dissenting in part).

Bell Atlantic and NYNEX were two such providers with monopolies in the local phone service markets. In August 1997, NYNEX merged into Bell Atlantic, creating one company that provides local phone service in New England, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia. Bell Atlantic controls the "local loop" in its territory. According to the plaintiff, the "local loop is the wireline—a twisted pair of copper wires, coaxial cable, fiber optic cable, or the like—that links the customer's premises to a central switching station," Compl. ¶ 21, from which calls are routed to their ultimate destination. "In plain English, loops are the wires that connect telephones to the switches that direct calls to their destination." *AT&T Corp. v. FCC*, 220 F.3d 607, 618 (D.C.Cir. 2000). The plaintiff alleges that currently a carrier needs access to the "local loop" in order to provide local service because the cost of building a new "local loop" is prohibitively expensive.

Recently, as noted above, national policy with respect to the desirability of allowing competition in the local phone service markets has changed dramatically. In 1996, Congress enacted the Telecommunications Act, which amended the Communications Act. Under the Telecommunications Act, states are no longer permitted to enforce laws that prohibit entry in a local phone service market. *See* 47 U.S.C. § 253(a). Moreover, the amendment imposes affirmative duties on any local phone service provider, or local exchange carrier ("LEC"), that encourage competition by, for example, requiring the LEC to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers. . . ." 47 U.S.C. § 251(b)(4). An incumbent local exchange carrier ("ILEC"), which is the carrier such as Bell Atlantic that had a monopoly in the local phone service market prior to the enactment of the Telecommunications Act, *see* 47 U.S.C. § 251(h)(1), has additional affirmative duties under the statute. Among other duties, upon the

request by another telecommunications carrier, the ILEC is required to provide interconnection with its network "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ." 47 U.S.C. § 251(c)(2)(C).

The plaintiff subscribed for local phone service with AT & T. Pursuant to the Telecommunications Act, AT & T had requested interconnection with the ILEC in the area, NYNEX, which later merged into Bell Atlantic. Upon such a request, section 252 of the Telecommunications Act allows the ILEC and requestor to enter into a binding agreement governing the interconnection arrangement that must ultimately be approved by a state commission. AT & T and NYNEX entered into such an agreement, which the state commission approved. *See Order Approving Interconnection Agreement, Case 96-C-0723*, 1997 WL 410707 (N.Y.P.S.C. June 10, 1997). Section 16 of the interconnection agreement provides for dispute resolution procedures that are the "exclusive remedy for all disputes between NYNEX and AT & T arising out of this Agreement or its breach." *Id.* at *23, § 16. The agreement also allows for disputes to be submitted to federal and state regulatory agencies. *Id.*

Shortly after entering into the interconnection agreement, AT & T filed complaints with regulatory authorities concerning lost and delayed orders. On March 9, 2000, Bell Atlantic entered into a consent decree with the FCC, agreeing to resolve the problem promptly and pay $3 million to the United States and $10 million to AT & T and other competitors for their losses. The consent decree was dissolved in July 2000.

II. The Plaintiff's Action and its Dismissal by the District Court

Not long after the consent decree was entered, the plaintiff filed a complaint in the United States District Court for the Southern District of New York *(Sidney H. Stein, J.)* asserting

multiple actions against Bell Atlantic: (1) an action pursuant to sections 206 and 207 of the Communications Act, alleging that Bell Atlantic violated: (a) section 202(a) of the Communications Act, which prohibits common carriers from discriminating in rates or services in providing communications services and (b) its obligations as an ILEC under subsections (b) and (c) of section 251 of the Telecommunications Act; (2) an action pursuant to the Clayton Act, alleging that Bell Atlantic violated section 2 of the Sherman Act; and (3) a state law claim for tortious interference with contract.

The plaintiff, a limited liability partnership organized under New York law, alleges that Bell Atlantic has not afforded competing local exchange carriers ("CLECs") with equal access to its network. The plaintiff claims that as a result, it has received poor local phone service. The amended complaint alleges:

> Bell Atlantic has not afforded CLECs access to the local loop on a par with its own access. Among other things, Bell Atlantic has filled orders of CLEC customers after fulfilling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with Bell Atlantic.

Consequently, the plaintiff claims Bell Atlantic violated the various duties imposed on it as an ILEC by subsections (b) and (c) of section 251 of the Telecommunications Act and its duties as a common carrier under section 202(a) of the Communications Act. The amended complaint also alleges that Bell Atlantic's conduct had no valid business reason and was intended to exclude competition from the market "by making

it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market." Am. Compl. ¶ 52.

The plaintiff seeks class certification pursuant to Fed.R. Civ.P. 23(b) on behalf of the "customers of a company other than Bell Atlantic with respect to the provision of Local Phone Service in the Geographic Market at any time since March 10, 1996," Am. Compl. ¶ 28, who were damaged by Bell Atlantic's alleged conduct. The plaintiff seeks damages, including treble damages for its antitrust claims. Moreover, the amended complaint asks for injunctive relief "enjoining Bell Atlantic from providing access to the local loop market ... to providers of Local Phone Service other than itself on terms and conditions that are not as favorable as those enjoyed by Bell Atlantic. . . ." Am. Compl. at 16.

Bell Atlantic moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the complaint. The district court granted the motion with respect to the Communications Act and antitrust claims, and declined to retain jurisdiction over the state law claim.

In adjudicating the plaintiff's antitrust claim, the district court in its thorough opinion initially evaluated Bell Atlantic's argument that the plaintiff did not have standing to bring an antitrust action because the only damage it suffered was as an indirect purchaser of services from AT & T. The district court rejected this argument, reasoning that the plaintiff's alleged harm, "damages resulting from poorer service than [it] would otherwise have received had Bell Atlantic acted lawfully, . . . is wholly distinct from the harm suffered by [AT & T]." *Trinko*, 123 F.Supp.2d at 741. Although the plaintiff had standing to bring an antitrust action, the district court held that the plaintiff did not sufficiently allege the "willful acquisition or maintenance" of monopoly power by Bell Atlantic. The district court noted that even a monopolist does not have a general duty under the antitrust laws to cooperate with its competitors. Citing the Seventh Circuit's

decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the district court observed that "[t]he affirmative duties imposed by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices." *Trinko*, 123 F.Supp.2d at 742. Characterizing the plaintiff's claim as solely an allegation that Bell Atlantic violated the Telecommunications Act, the district court found that such an allegation was insufficient to support an antitrust claim.

The district court also dismissed the plaintiff's Communications Act claims. Initially, the district court rejected Bell Atlantic's argument that the damages provisions of the Communications Act do not apply to the Telecommunications Act. The district court concluded that the Telecommunications Act was an amendment to the Communications Act and that private lawsuits are not generally incompatible with the regulatory scheme established by the Telecommunications Act. However, the district court dismissed the claims based on the doctrine of prudential standing, the judge-made rule that prevents a third party from asserting the rights of others. The district court reasoned that section 251 of the Telecommunications Act "imposes duties on incumbent carriers only as to local competitors, and those rights are triggered only when a competing carrier requests interconnection." *Trinko*, 123 F.Supp.2d at 744 (citation omitted). Therefore, a suit brought by the plaintiff alleging violations of section 251 would impermissibly assert the rights of Bell Atlantic's local competitor, AT & T. Similarly, the district court explained that section 202(a) of the Communications Act only imposes duties on a carrier with respect to its own customers. *See id.* Thus, the district court concluded that only Bell Atlantic's customers have a right to bring suit under section 202(a), barring the plaintiff, which is a customer of AT & T, from bringing suit. The district court dismissed the plaintiff's section 202(a) claim without prejudice, allowing the plaintiff to replead its claim within 20 days. Finally,

because the district court dismissed all of the plaintiff's federal claims, it declined to retain supplemental jurisdiction over the plaintiff's state law tortious interference claim.

The plaintiff then moved for reconsideration of the district court's decision. While the district court denied the motion, it allowed the plaintiff to replead its antitrust claim in addition to its section 202(a) claim. In its amended complaint, the plaintiff attempted to retool its section 202(a) claim to avoid the assertion of a third party's rights. The plaintiff alleged that it had a direct relationship with Bell Atlantic because AT & T acted as the plaintiff's agent with respect to Bell Atlantic.[2] The plaintiff also characterized its antitrust claim as a monopoly leveraging claim. Bell Atlantic again filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and the district court granted the motion. The district court rejected the plaintiff's amended section 202(a) claim because the plaintiff failed to allege facts establishing a principal-agent relationship. The district court also concluded that there was no antitrust claim because the amended complaint did not describe anticompetitive conduct and only alleged that Bell Atlantic breached its own contracts with competitors.

The plaintiff filed a timely notice of appeal and this appeal ensued.

DISCUSSION

I. The Communications Act Claims

A. General Principles of Standing

We first address the district court's dismissal of the plaintiff's Communications Act claims through application of the prudential standing doctrine. We review a district court's dismissal of a complaint for lack of standing *de novo*. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000).

---

[2] The plaintiff did not assert this theory on appeal.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted); *accord Lamont v. Woods*, 948 F.2d 825, 829 (2d Cir. 1991). Both limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498 (citations omitted). The constitutional dimension of the standing doctrine originates from Article III of the Constitution, which confines federal courts to adjudicating "cases" and "controversies." To meet the constitutional test for standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citation omitted).

It is undisputed that the plaintiff meets the constitutional limits of standing. The issue is whether the plaintiff satisfies the judge-created prudential requirements of standing. "Foremost among the prudential requirements is the rule that a party must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Wight*, 219 F.3d at 86 (quoting *Warth*, 422 U.S. at 499). "[T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing. . . . Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500; *accord Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 185 (2d Cir. 2001). Thus, the issue is whether the plaintiff has a right to judicial relief under sections 206 and 207 of the Communications Act for

alleged violations of section 202(a) of the Communications Act and subsections (b) and (c) of section 251 of the Telecommunications Act.

B. Sections 206 and 207 of the Communications Act

The district court assumed that the plaintiff's rights under the Communications Act could only arise from duties defined by the substantive provisions of the Act. Because the plaintiff could not identify a duty to it arising directly from sections 202(a) or 251, the district court held that the plaintiff was impermissibly attempting to assert the rights of third parties.

In determining whether the plaintiff has a right under the Communications Act, the proper focus is not sections 202(a) or 251, but the Act's liability and damages provisions, sections 206 and 207. The plaintiff's right to bring an action under the Communications Act originates from sections 206 and 207 of that Act. Section 206 makes a common carrier "liable to the person or persons injured" as a result of the common carrier's violation of the Communications Act. 47 U.S.C. § 206.[3] Section 207 gives the person damaged by the common carrier's violation of the Act the right to bring an action in federal court. *See* 47 U.S.C. § 207.[4] Sections 206

---

[3] Section 206 provides in full:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206.

[4] Section 207 provides in full:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the

and 207 are broadly written and explicitly encompass all of the substantive provisions of the Communications Act. While a particular substantive provision may not provide the plaintiff with a particular right, if the violation of that provision injures the plaintiff, sections 206 and 207 of the Communications Act confer upon the plaintiff the right to bring an action to recover for its injuries.

C. Section 202(a) of the Communications Act

The plaintiff alleges that the defendant violated section 202(a) of the Communications Act. Section 202(a) provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a). "An inquiry into whether a carrier is discriminating in violation of § 202(a) involves a three-step inquiry: (1) whether the services are 'like'; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable." *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C.Cir. 1993); *see also National Communications Ass'n, Inc. v.*

Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

AT & T, 238 F.3d 124, 127 (2d Cir. 2001) (assuming that this three-step inquiry applies in this Circuit). "[T]he Congressional concern in enacting . . . § 202(a) specifically, was to eliminate the use of monopolistic power to stifle competition." *National Communications*, 238 F.3d at 131 (citations omitted).

The discrimination described in the complaint suffices to state a claim under section 202(a). In *National Communications Ass'n, Inc. v. AT&T*, we upheld a finding of discrimination under section 202(a) where a telecommunications carrier favored its own end-user customers over resellers. 238 F.3d 124, 127-28 (2d Cir. 2001). The plaintiff has also alleged that CLECs such as AT & T obtaining services under the resale provisions of § 251 received telecommunications services inferior to those supplied to the defendant's own end-users.

Although the plaintiff alleged a cognizable form of discrimination by the defendant, the district court dismissed the plaintiff's section 202(a) action based on the doctrine of prudential standing. In doing so, the district court assumed that the plaintiff's right to bring suit under the Communications Act originates from section 202(a). While the text of section 202(a) broadly prohibits discrimination against "any particular person, class of persons, or locality," 47 U.S.C. § 202(a), the district court characterized section 202(a) as only creating a duty between a communications provider and its direct customer. The district court concluded that the plaintiff has no action under section 202(a) because it was not a direct customer of Bell Atlantic, and was instead a customer of AT & T, which was a customer of Bell Atlantic. Under the district court's theory, only AT & T would have a section 202(a) action against Bell Atlantic.

But as we explained earlier, the plaintiff's right to sue does not stem from section 202(a). It originates from sections 206 and 207, which makes parties who violate the Communications Act liable to parties they injure through such violations.

Bell Atlantic does not dispute on appeal that there is arguably a violation of section 202(a) with respect to its dealings with AT & T. The plaintiff alleges that it was injured by this violation of the Communications Act because it received poor local phone service. As an entity that contends that it was injured by Bell Atlantic's alleged violation of section 202(a), the plaintiff plainly meets the requirements for having an action under sections 206 and 207. The plaintiff is asserting its own rights. Therefore, the district court erred in dismissing the case based on the doctrine of prudential standing.

To support its argument for dismissal, the defendant points to the absence of published cases involving actions by indirect purchasers allegedly injured by railroad rates that were regulated by the now repealed Interstate Commerce Act ("ICA"). Because "[s]ections 206 and 207 of the Communications Act were expressly modeled on the enforcement provisions of the ICA," this Court has "held that decisions construing the ICA are persuasive in establishing the meaning of the Communications Act. . . ." *Conboy*, 241 F.3d at 250; *see also AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998); H.R.Rep. No. 73-1850, at 6 (1934).[5]

Although we have found no indirect purchaser case brought under the ICA, the defendant does not point to any authority barring such a suit. In light of the unambiguous language of sections 206 and 207, the absence of such a case

[5] Prior to passage of the Communications Act, the communications industry was regulated by the ICA. In 1910, Congress extended regulation to communications common carriers through the Mann-Elkins Act, which amended the ICA to bring such carriers under the jurisdiction of the Interstate Commerce Commission. In 1934, the Communications Act created the FCC to regulate the communications industry. *See Iowa Utils. Board*, 525 U.S. at 403-04 (Thomas, J. concurring in part and dissenting in part); Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose, in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 3 (Max D. Paglin, ed., 1989).

is insufficient to establish that such an action is not permitted. Moreover, the Supreme Court did state in *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 13 (1943), that shippers, who tend to be the parties most directly injured by discriminatory rates, were not the only entities that could bring actions for discriminatory rates under the ICA. The discussion in *L.T. Barringer* is consistent with the language of sections 206 and 207, which provides that any party injured by conduct that violates the Communications Act has the right to bring an action.

Bell Atlantic contends that the plaintiff cannot bring suit because its injury is wholly derivative of the injury suffered by AT & T. In the RICO context, it is well-established that a plaintiff must establish that the defendant's conduct was a proximate cause of its injury in order to have standing to bring a RICO action. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 267-70 (1992); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir. 1999). We have noted that "to plead a direct injury is a key element for establishing proximate causation. . . ." *Laborers Local*, 191 F.3d at 235. But we have not held that sections 206 and 207 of the Communications Act contain a requirement of proximate cause. We need not resolve the difficult issue of whether there is such a requirement, however, because on this record the plaintiff sufficiently alleges that it suffered a direct injury. In discussing the question of antitrust standing, the district court found that "[t]he harm that these customers are alleging—damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully—is wholly distinct from the harm suffered by the competitors." *Trinko*, 123 F.Supp.2d at 741. The plaintiff alleges that it suffered a direct harm, poor phone service, as a result of the defendant's mis-

conduct.[6] While the district court may find otherwise after discovery and a motion for summary judgment, it is too early to conclude on this record that the plaintiff only suffered a wholly derivative injury.

Bell Atlantic asserts a number of other arguments for dismissal that the district court did not consider. Specifically, it claimed that the case should be dismissed under the filed rate doctrine and because the plaintiff has not pleaded specific damages. These are grounds that the district court did not address in its decision, which solely relied on the doctrine of prudential standing in dismissing the case, and we will not decide those issues in the first instance on this appeal.

We are of the view that the district court erred in dismissing the plaintiff's section 202(a) claim based on the doctrine of prudential standing. Because the discrimination described in the complaint would violate section 202(a) of the Communications Act and allegedly caused a direct injury to the plaintiff, the plaintiff is asserting its own rights under sections 206 and 207 of the Communications Act. We therefore reverse the district court's dismissal of the plaintiff's section 202(a) claim based on the doctrine of prudential standing.

D. Section 251 of the Telecommunications Act

The plaintiff's attempt to bring a claim for alleged violations of section 251 of the Telecommunications Act is problematic.[7] We agree that the claim should be dismissed

---

[6] The defendant contends that the plaintiff essentially describes an overcharge claim, which only resulted in an indirect injury. While the plaintiff's alleged receipt of poor service means that it paid too much for the service it received, the plaintiff's claim for damages cannot be narrowly pigeon-holed into the category of an excessive charge. The plaintiff contracted for a basic level of adequate service with the expectation that it would receive such service. Instead, the defendant's misconduct allegedly disrupted these expectations, and perhaps damaged the plaintiff's business. Such allegations describe a direct injury.

[7] Subsections (a), (b), and (c) of Section 251 read:

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

but for different reasons than the district court gave.

The plaintiff alleges that the defendant violated its duties as an ILEC as defined by subsections (b) and (c) of section 251 of the Telecommunications Act. Section 251 seeks to open local telecommunications markets to competition. While section 251 establishes a number of broadly stated duties that can be construed as substantive norms of behavior, the Telecommunications Act allows an ILEC to substantially fulfill its duties under subsections (b) and (c) of section 251

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. §§ 251(a)-(c).

by entering into interconnection agreements with telecommunications carriers seeking to enter the local market. These agreements are reached primarily through a process of negotiation and must ultimately be approved by a state commission. The parties may ask the state commission to arbitrate any disputes that arise in the negotiating process. After the state commission approves such an agreement, the Telecommunications Act intends that the ILEC be governed directly by the specific agreement rather than the general duties described in subsections (b) and (c) of section 251.

In this case, AT & T and Bell Atlantic have negotiated an interconnection agreement. During this process they submitted a number of issues to the state commission for arbitration. Those disputes were resolved and the entire agreement has been approved by the state commission. This agreement provides for a dispute resolution mechanism that the parties have utilized. At best, the plaintiff's section 251 claim only describes conduct by the defendant that would violate the interconnection agreement. Therefore, the plaintiff has no cause of action pursuant to sections 206 and 207 of the Communications Act for injury stemming from a violation of section 251.

Initially, we note that the district court was correct in concluding that section 251 defines duties between telecommunications carriers. It is clear that the duties enumerated in section 251 regulate the relationships between telecommunications carriers, especially those that are seeking to enter the market for local phone service, rather than the relationships between telecommunications carriers and consumers. In fact, the Committee Report notes that section 251 "imposes a general duty to interconnect directly or indirectly *between all telecommunications carriers*. . . ." H.R. Conf. Rep. 104-458, 1996 WL 46795, at *121 (1996) (emphasis added). While the Telecommunications Act and legislative history often refer to the fact that consumers will ultimately benefit from competitive communications markets, that is only a collateral

effect of the implementation of these duties by telecommunications carriers.

It could be argued that if the plaintiff has a right to bring suit for a violation of the Telecommunications Act, such a right would arise from sections 206 and 207 of the Communications Act. On this view, if the plaintiff has such a right, the district court's dismissal of the plaintiff's section 251 claim based on the doctrine of prudential standing would have been in error. However, we need not reach the issue of whether the plaintiff has the right under sections 206 and 207 to bring suit for a violation of the Telecommunications Act because the plaintiff does not describe conduct by the defendant that would violate section 251 of the Telecommunications Act.

While the duties regulating ILECs enumerated in subsections (b) and (c) of section 251 appear at first glance to be free-standing, in practice, section 251 envisions that these duties will be implemented through state approved contracts between the carrier requesting interconnection and the ILEC. Section 251 requires the ILEC and requesting carrier to "negotiate in good faith in accordance with section 252 . . . agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection." 47 U.S.C. § 251(c)(1). In other words, an ILEC can meet its obligations under subsections (b) and (c) by entering into an interconnection agreement with a requesting carrier through the procedures outlined in section 252. Such interconnection agreements do not necessarily reiterate the duties enumerated in section 251. Instead, the ILEC and requesting carrier have the option of contracting around the obligations set forth in subsections (b) and (c) of section 251. Section 252(a)(1) of the Telecommunications Act provides: "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter

into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251. . . .*" 47 U.S.C. § 252(a)(1) (emphasis added).

Section 252 also provides for regulation of interconnection agreements by state commissions. For example, if there are disputes in the negotiation of an interconnection agreement, the parties can request arbitration by the state commission to decide any open issues. *See* 47 U.S.C. § 252(b)(1). The state commission is required to resolve such disputes through reference to section 251. *See* 47 U.S.C. § 252(c)(1). The state commission must also ultimately approve the interconnection agreement. In evaluating parts of an interconnection agreement for approval, the statute requires the state commission to use different criteria depending on whether the portion of the agreement was negotiated or arbitrated. The state commission may only reject negotiated portions of an interconnection agreement if they discriminate against a non-party telecommunications carrier or if the implementation of the agreement goes against the public interest. *See* 47 U.S.C. § 252(e)(2)(A). On the other hand, when parts of the interconnection agreement go through the arbitration procedure, the state commission may only reject an arbitrated portion of the agreement if it does not comply with section 251. *See* 47 U.S.C. § 252(e)(2)(B).

NYNEX, which later merged with Bell Atlantic to form the defendant, and AT & T used the procedures described in section 252 to enter into an interconnection agreement that was ultimately approved by the state. Because they disagreed on a number of issues, the parties submitted certain disputes to the New York Public Service Commission for arbitration. *See Order Approving Interconnection Agreement*, 1997 WL 410707, at *1. The New York Public Service Commission resolved the disputes and ultimately approved the agreement as compliant with section 251 and consistent with the public interest. *See id.* at *4.

The issue before us is whether conduct that breaches the defendant's interconnection agreement with AT & T can also be considered a violation of subsections (b) and (c) of section 251. We conclude that in this case it does not. Once the ILEC "fulfill[s] the duties" enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, 47 U.S.C. § 251(c)(1), it is then regulated directly by the interconnection agreement. Moreover, the fact that the Telecommunications Act allows parties to negotiate interconnection agreements without regard to subsections (b) and (c) of section 251, *see* 47 U.S.C. § 252(a)(1), indicates that Congress envisioned the possibility that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute. To read the Telecommunications Act in a way such that ILECs are governed exclusively by the broadly worded language of section 251 would make the option of negotiating interconnection agreements without regard to subsections (b) and (c) of section 251 superfluous.

The elaborate process of negotiation and arbitration set forth in section 252 indicates that Congress sought to allow ILECs and their competitors to govern their interconnection relationships directly through specific interconnection agreements rather than the broadly outlined duties described in subsections (b) and (c) of section 251. Interconnection agreements are necessary because the particular ways in which the broadly framed duties enumerated in section 251 are implemented may differ depending on the circumstances. Rather than primarily regulating the relationships between entering carriers and the incumbent ILEC through abstract duties enforceable in court, Congress chose to give the parties the option to negotiate particular agreements with the aid and ultimate approval of state regulatory bodies, which have specialized expertise in the area of telecommunications. This option offers telecommunications carriers the choice to use a regulatory process that might be more efficient than other

alternatives. If ILECs were governed by the abstract duties described in section 251 despite the existence of a particular interconnection agreement that was approved by the state commission after an extensive process of negotiation and arbitration, they would have diminished incentive to enter into such agreements. A requesting carrier could end-run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251.[8]

The particular interconnection agreement entered into by the defendant and AT & T requires the parties to resolve any disputes through procedures set forth in the agreement. We take judicial notice of the fact that the dispute between Bell Atlantic and AT & T arising out of the factual allegations in the complaint has been resolved through these procedures. The defendant fulfilled its duties as an ILEC under subsections (b) and (c) of section 251 by entering into a state approved interconnection agreement with AT & T through the procedures described in section 252. While the defendant may have breached its obligations under the interconnection agreement, because its duties as an ILEC are directly defined by that agreement, there was no underlying violation of

[8] Because the interconnection agreement in this case is closely linked to section 251 of the Telecommunications Act, the dissent argues that the defendant's failure to fulfill its obligations under the agreement may also support a right of action under 47 U.S.C. §§ 206 & 207, which may provide a right of action for violations of the Telecommunications Act. While it is true that the New York Public Service Commission found that the interconnection agreement in this case "does not violate the requirements of the Act," this finding was "subject to clarifications discussed below [in the text of the Commission's Order Approving Interconnection Agreement]." *See* Order Approving Interconnection Agreement, 1997 WL 410707, at *3. The Commission's language confirms that the particular form of the duties defined by the interconnection agreement in this case do not simply reiterate the general duties imposed by section 251.

subsections (b) and (c) of section 251.[9] Without an underlying violation of section 251, the plaintiff has no cause of action under sections 206 and 207, even if it were permitted to bring a suit for violations of section 251 pursuant to sections 206 and 207.[10]

II. The Antitrust Claim

Finally, we address the district court's dismissal of the plaintiff's antitrust claim. We agree that the plaintiff has standing to bring an antitrust claim. However, we reverse the district court's dismissal of the plaintiff's antitrust claim pursuant to Fed.R.Civ.P. 12(b)(6).

A. Standing

Initially, we review the district court's conclusion that the plaintiff has standing to bring an antitrust suit. The Clayton Act provides an action for "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15. To have standing to bring an action under the Clayton Act, the plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Volvo N. Am. Corp. v. Men's Inter. Prof'l Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988) (internal quotations and citations omitted).

[9] The complaint does not allege that Bell Atlantic violated subsection (a) of section 251. Moreover, subsection (a) only requires basic interconnection and compatibility of standards. The complaint does not describe conduct by Bell Atlantic that would violate these duties.

[10] We stress that because this is a case where an interconnection agreement has been entered into by the parties and approved by the state, we do not decide whether a plaintiff can bring suit for a violation of the duties under section 251 when there is no such agreement. Moreover, we emphasize that our analysis is limited to section 251 of the Telecommunications Act and does not address other provisions of that Act.

The plaintiff alleges that it received poor local phone service because of Bell Atlantic's attempt to maintain its monopoly power by refusing to provide equal access to its local network. The defendant asserts that the plaintiff has no antitrust standing because it only suffered an indirect injury. According to the defendant, its alleged actions only directly injured its direct customer, AT & T. The plaintiff could only have been injured incidentally, through its purchase of inferior services from AT & T. The defendant thus contends that the plaintiff is essentially an indirect purchaser who cannot recover antitrust damages under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that a customer of a customer who is overcharged by a monopolist does not have antitrust standing. The rationale for the *Illinois Brick* rule is that it is difficult to calculate the damages suffered by an indirect purchaser. *See id.* at 737- 47. The indirect purchaser is only damaged to the extent that the direct purchaser passes on to it the overcharge resulting from the anticompetitive conduct. Any such calculation would be imprecise and could result in double recovery if both the direct and indirect purchasers sue and the calculations in their suits differed.

The problem with simply applying the *Illinois Brick* rule to this case is that AT & T cannot be characterized solely as a customer of Bell Atlantic. While AT & T purchases access to the local network from Bell Atlantic, it is also a competitor of Bell Atlantic in the retail market for selling local phone service to consumers. Consequently, this is a case where the anticompetitive conduct has allegedly damaged the customer of a competitor who would have antitrust standing under *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). In *McCready*, the Supreme Court found that an individual who was denied coverage for treatment by a psychologist as a result of an alleged conspiracy between his health plan and a group of psychiatrists had antitrust standing. The defendants in that case alleged that the conspiracy only injured the competitors of the psychiatrists, the psychologists. The

Supreme Court, however, found that a customer of a competitor can suffer a direct injury from an anticompetitive scheme aimed principally at the competitor. To illustrate this principle, the Supreme Court used a simple example. As a result of the scheme to exclude psychologists from the market, the person seeking coverage for treatment by a psychologist has two choices: (1) visit a psychologist and not receive reimbursement; or (2) visit a psychiatrist. While the second choice hurts the psychologist in its role as a competitor of psychiatrists, the first choice directly hurts the customer of the psychologist. *See McCready*, 457 U.S. at 483-84. As a result of an alleged monopoly scheme, the plaintiff in this case had a similar set of choices: (1) stay with AT & T and receive inferior local service; or (2) switch to Bell Atlantic. While the second choice would hurt AT & T as a competitor, the first choice directly injures the plaintiff as a consumer. In this case, the plaintiff made the first choice and suffered the requisite antitrust injury.

The defendants in *Illinois Brick* were alleged price-fixers. *Illinois Brick* assumes a case where customers and customers of customers are only affected by the anticompetitive scheme through the imposition of prices higher than prices in a competitive market. In such a case, the only harm suffered by the customer of the customer is that part of the higher prices are passed on to it. In this case, Bell Atlantic was not simply charging higher prices, it was also allegedly trying to interfere with AT & T's opportunity to compete with it. Thus, there is more at stake here than the imposition of higher prices, which are indirectly passed on to others. There is allegedly conduct that is meant to drive a competitor out of the market. Action meant to injure a competitor can directly harm the consumer who chooses to do business with the competitor. In this case, allegedly the plaintiff was harmed directly when it received poor phone service because it chose to do business with AT & T.

The district court correctly concluded that the plaintiff has antitrust standing.

B. The Sherman Act Claim

Generally, a plaintiff can establish that a defendant violates section 2 of the Sherman Act by proving two elements "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Volvo N. Am. Corp.*, 857 F.2d at 73 (citations omitted); *accord Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998).

The district court dismissed the plaintiff's antitrust claim, finding that the plaintiff did not state a claim with respect to the second element. The district court reasoned that a monopolist does not have a general duty to cooperate with its competitors. Relying on *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the district court concluded that at most the plaintiff had only alleged that the defendant breached section 251 of the Telecommunications Act.

While it is true that a monopolist has no general duty to cooperate with its competitors, "[a] monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market." *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988) (citations omitted). As the Supreme Court has explained:

> [t]he absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985). For example, a monopolist has a duty to provide competitors with reasonable access to "essential facilities," facilities under the monopolist's control and without which one cannot effectively compete in a given market. *See Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C.Cir. 1984) ("access to essential facilities [must] be afforded to competitors 'upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.'") (quoting *United States v. Terminal R.R. Assoc.*, 224 U.S. 383, 411 (1912)); *see also Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568-69 (2d Cir. 1990) (discussing essential facilities theory).

While it is clear that a plaintiff would not state an antitrust claim against a defendant simply by alleging that the defendant violated its duties under section 251, the plaintiff's antitrust claim does not merely allege that the defendant violated section 251. In fact, it does not mention section 251 at all. The allegations in the amended complaint describe conduct that may support an antitrust claim under a number of theories. While some of this conduct might also violate section 251, these are not merely allegations that section 251 has been violated.

First, the amended complaint may state a claim under the "essential facilities" doctrine. The plaintiff alleges that access to the local loop is essential to competing in the local phone service market, and that creating independent facilities would be prohibitively expensive. The defendant allegedly

has failed to provide its competitor, AT & T, reasonable access to these facilities.[11] The plaintiff claims it was injured when the local phone service it purchased from AT & T was disrupted as a result of this alleged violation of the antitrust laws.[12] Although the defendant may ultimately be able to show that the local loop is not an essential facility, or that it provided the plaintiff with reasonable access to the local loop, these are issues that the district court should consider in the first instance.

Second, the plaintiff may have a monopoly leveraging claim. To have such a claim, the plaintiff must show that the defendant "(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage ... in another distinct market; and (3) caused injury by such anticompetitive conduct." *Virgin Atl. Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001). The amended complaint alleges that the defendant has monopoly power over a wholesale market in which it sells access to the local loop to telecommunications carriers. It also alleges that the defendant used that power to gain a competitive advantage in a retail market in which telecommunications carriers sell local phone service to consumers. *See, e.g., M.A.P. Oil Co. v.*

[11] We do not suggest that any or every disruption in local phone service would support an essential facilities claim. For example, a minor, isolated, and accidental disruption in access to an essential facility would be insufficient as a matter of law to establish an antitrust violation. There must be sufficient evidence to conclude that the defendant controlling the essential facility denied or disrupted a competitor's access to that facility with the intention of maintaining its monopoly power.

[12] We observe that while the defendant must be a competitor of the entity to which it denies reasonable access to the essential facility for there to be a violation of section 2 of the Sherman Act, *see Official Airline Guides, Inc. v. Federal Trade Comm'n*, 630 F.2d 920, 926 (2d Cir. 1980), the Clayton Act, 15 U.S.C. § 15, provides a consumer plaintiff directly injured by such an antitrust violation with a cause of action regardless of whether the consumer plaintiff is a competitor of the defendant.

Texaco, Inc., 691 F.2d 1303, 1307 (9th Cir. 1982) (noting that distinct customers and distinct prices are factors useful in identifying a distinct market) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). Finally, the plaintiff alleges that it was injured by this anticompetitive conduct. Again, the defendant ultimately may be able to refute these claims on summary judgment, but we cannot resolve them on the merits at this stage of the litigation.[13]

In *Goldwasser*, the Seventh Circuit dismissed similar allegations of monopolistic conduct for two reasons. First, it found that the claim was "inextricably linked" to allegations by the *Goldwasser* plaintiff that section 251 of the Telecommunications Act had been violated. Thus, the claim was merely an allegation that the Telecommunications Act was violated and not a freestanding antitrust action. But there is no requirement that an allegation that otherwise states an antitrust claim must not rely on allegations that might also state a claim under another statute. Congress, of course, can indicate that such a statute provides an implicit immunity from the antitrust laws. Conduct that merely describes a violation of a statute that is meant to immunize a regulated

[13] The plaintiff has also asserted an attempted monopolization claim. To establish such a claim, a plaintiff must show that the defendant "(1) engaged in anticompetitive or predatory conduct with (2) specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *AD/SAT v. Associated Press*, 181 F.3d 216, 226 (2d Cir. 1999). This claim is derivative of the monopoly leveraging and essential facilities claims. If the plaintiff demonstrates that the defendant engaged in monopoly leveraging, or denied it reasonable access to an essential facility, then it has established the first element of the attempted monopolization claim that the defendant engaged in anticompetitive behavior. Based on our reading of the amended complaint, however, the plaintiff does not describe any additional predatory or anticompetitive conduct that would establish the first prong of an attempted monopolization claim. While on remand, the plaintiff may add allegations that would describe additional predatory behavior, at this point, the plaintiff has not established a separate attempted monopolization claim.

industry from antitrust scrutiny could not support an antitrust action. But we do not lightly find that a statute provides such an implicit immunity. Absent a "plain repugnancy," we will not assume that a regulatory statute implicitly repeals the antitrust laws. *See Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82-83 (2d Cir. 1981). If there is no such implicit immunity, as long as a set of allegations states an antitrust action on its own terms, the fact that it closely resembles an action brought under another statute in itself is unproblematic.

There is no "plain repugnancy" between the antitrust laws and the Telecommunications Act. In fact, the purpose of the Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." H.R. Cong. Rep. 104-458, 1996 WL 46795, at *1 (1996); 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 162-63 (2000) ("The 1996 [Telecommunications] Act goes very far toward throwing all aspects of the industry open to competition and thus antitrust analysis."). Moreover, the Act contains a specific savings clause, which specifies that "nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152, Historical and Statutory Notes. The meaning of the statutory provision is plain on its face and must guide our analysis. *See Lebron v. Russo*, 263 F.3d 38, 41 (2d Cir. 2001) (per curiam). The savings clause unambiguously establishes that there is no "plain repugnancy" between the Telecommunications Act and the antitrust statutes. We thus find that the Telecommunications Act does not provide an "implicit immunity" from the antitrust laws.[14]

The *Goldwasser* court's conclusion also rested on the assumption that "[t]he antitrust laws would add nothing to the oversight already available under the 1996 law." *Goldwasser*, 222 F.3d at 401. But in this case, which involves an individual consumer seeking damages, the antitrust laws serve an important role. One of the purposes of the Clayton Act is "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co.*, 431 U.S. at 746 (citation omitted). Because this plaintiff has no remedy under the Telecommunications Act for a violation of subsections (b) and (c) of section 251, the antitrust laws are the only place where it has a remedy for damage caused by the allegedly anticompetitive behavior described in the amended complaint. Thus, in this case, the antitrust laws serve the purpose of affording the consumer compensation that the Telecommunications Act does not provide.

The second reason the *Goldwasser* court gave for dismissing the suit was that allowing an antitrust suit based on allegations arising out of the alleged refusal of an ILEC to grant an LEC equal access to its network "would ... force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are

---

[14] Citing Justice Breyer's partial concurrence and partial dissent in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 428-29, the defendant generally asserts that duties requiring sharing of infrastructure may actually reduce competition. But Justice Breyer's point was made in the context of an argument for applying an "essential facilities" standard to the sharing requirements of the Telecommunications Act. Justice Breyer only contended that sharing might reduce competition when the sharing involved a resource that was not an "essential facility." In the case at hand, in contrast, the plaintiff alleges that the local network is an "essential facility."

compatible with the procedures that would be used to accomplish the same result under the antitrust laws." *Goldwasser*, 222 F.3d at 401. *Goldwasser* raises the issue of whether the Telecommunications Act is "specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Id.*

But the Telecommunications Act, while meant to create significant change in a market, is not unprecedented as a legislative attempt to open markets to competition. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court held that the antitrust laws apply to at least one other industry regulated by a statute that was intended to encourage competition in the industry. In reviewing a finding of antitrust liability against an electric utility company for its refusal to sell energy at a wholesale price to competing providers, the Supreme Court evaluated the utility's argument that it was not subject to antitrust regulation because of the Federal Power Act. The Court noted that the Act embodied "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Id.* at 374. To achieve this end, section 202 of the Federal Power Act not only encouraged voluntary interconnections of power but also gave the Federal Power Commission the authority to order interconnections. *See id.* at 373. The Telecommunications Act is like the Federal Power Act in that both statutes govern interconnection relationships "in the first instance by business judgment and not regulatory coercion." *Id.* at 374. Sections 251 and 252 of the Telecommunications Act allow ILECs to negotiate voluntarily interconnection agreements with CLECs. Under section 271 of the Telecommunications Act, ILECs can meet one of the requirements of providing long distance service if they negotiate a voluntary interconnection agreement that is approved by a state regulatory agency. See 47 U.S.C. § 271(c)(1)(A). The role of the state agency is not to mandate particular interconnection arrangements but to oversee the process of

voluntary negotiations. While the state regulatory agency is required to approve interconnection agreements, it may only reject an interconnection agreements in certain circumstances. See 47 U.S.C. § 252(e)(2). Although the regulatory process envisioned by the Federal Power Act may not have been as complex and comprehensive as the procedures enumerated in the Telecommunications Act, the statutes have similar purposes and primarily rely on voluntary negotiations. And despite a specific regulatory structure that was meant to encourage competition through interconnection, the Court found that the Federal Power Act did not preclude an antitrust suit against the regulated utility. Thus, controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws.

Moreover, there is a factual similarity between this case and *Otter Tail Power*. In *Otter Tail Power*, the Supreme Court affirmed a lower federal court that ordered the defendant to "wheel electric power over its transmission lines from other electric power lines to [ ] cities and towns [in its service area]." *Otter Tail Power*, 410 U.S. at 375. Because the Federal Power Commission was not permitted under the Federal Power Act to order such wheeling, the Supreme Court noted that the district court's order did not conflict with the Commission's authority. *See id.* While the Federal Power Commission had the power to "direct a public utility . . . to establish physical connection of its transmission facilities with the facilities [of other sellers of electricity]," *id.* at 375 n.7, it did not have the authority to mandate the particular remedy that the district court had ordered. Similarly, in this case, while state regulatory agencies have the power under the Telecommunications Act to reject interconnection agreements under certain circumstances, they do not have the authority to award the particular remedy that the plaintiff is seeking. The Telecommunications Act does not give state regulatory agencies the power to award consumers

compensation for injury caused by service disrupted by an ILEC that is unlawfully attempting to maintain its local monopoly. Thus, if the district court were to find the defendant liable for violating antitrust law and award the plaintiff damages, such an order would not conflict with the authority of the relevant state regulatory agency.

It is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act. In discussing the impact such suits would have on the regulatory process, it is useful to discuss separately suits seeking damages and suits for injunctive relief. Awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act. In contrast, injunctive relief in this area may have ramifications that require particular judicial restraint.

While allowing damages actions would mean that ILECs would to some extent be subject to both the antitrust laws and their interconnection agreements, the defendant points to no specific areas where the two sets of obligations would conflict.[15] The defendant contends that its conduct should only be viewed as a breach of its interconnection agreement with AT & T that should exclusively be remedied by the regulatory process. However, there is no authority for the proposition that entering into an interconnection agreement

[15] Under section 252, an ILEC could theoretically negotiate an interconnection agreement that defined its duties in a way that conflicts with subsections (b) and (c) of section 251. *See* 47 U.S.C. § 252(a)(1). But the defendant has not contended that this particular interconnection agreement conflicts with principles of antitrust law. Moreover, it seems unlikely to us that the LEC entering the market would agree to an interconnection agreement that would in some way reduce competition in the market by restricting the LEC's access to the local loop. If such a conflict were to arise, the state regulatory commission would resolve the dispute, using section 251 as a guideline. *See* 47 U.S.C. § 252(c)(1).

exempts a telecommunications carrier from the antitrust laws.[16] To the contrary, if the defendant's conduct did violate the antitrust laws, the fact that the regulatory commission also condemned the conduct of the defendant may indicate that the purposes of the two schemes are in synch, reinforcing our conclusion that there is no "plain repugnancy" between the statutes. As the plaintiff points out, the breach of such an agreement may in some cases be a means by which the ILEC improperly excludes competition from the market. In this case, the main difference in the two frameworks is that AT & T may seek remedy through the regulatory process while the consumer may seek remedy under the antitrust laws. The two schemes complement rather than contradict each other.

While ideally, the regulatory process alone would be enough to bring competition to the local phone service markets,[17] it is possible that the antitrust laws will be needed to supplement the regulatory scheme, especially with respect to injury caused to consumers.[18] *See Reiter v. Sonotone*

[16] In contrast, there is specific statutory authority that the negotiation of such an agreement fulfills the telecommunication carrier's duties under subsections (b) and (c) of section 251. *See* 47 U.S.C. § 251(c)(1).

[17] The defendant cites *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), an opinion written by Justice Breyer when he was a circuit judge, for the general proposition that regulation inherently reduces the risk of antitrust harm. *Town of Concord*, however, must be read in light of its particular context, a claim alleging a price squeeze in the public utilities industry where regulators had the authority to maintain prices at "reasonable" levels. *Id.* at 25-26. The subject matter of this litigation focuses on the issue of equal access to networks. On this appeal from an order granting a motion to dismiss, we cannot assess the effectiveness of regulation in this industry. In contrast, *Town of Concord* was an appeal after a jury trial where the First Circuit had a complete record to make this determination.

[18] In this case, the relevant regulatory action was directed at AT & T's injuries, not the alleged injuries of AT & T's consumers. Thus, this is not a case like *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 313 n. 19 (1963), where a civil antitrust suit was dismissed because an

Corp., 442 U.S. 330, 344 (1979) ("private [antitrust] suits provide a significant supplement to . . . enforc[ement] [of] the antitrust laws and deterring violations.").[19] Moreover, at this stage, the record does not allow us to conclude that the regulatory process has successfully eliminated the risk of anticompetitive behavior in this particular market. There has been no discovery and the evidence has not been developed with respect to this issue.

Additionally, courts are suited to the task of assessing the extent of damages allegedly caused by unlawful behavior. Damages can be tailored to award one-time relief to retroactively compensate individuals for injuries caused by past misconduct. The award of such damages would not substantially interfere with the broader regulatory process. *See, e.g.*,

---

administrative agency may have had the power to award the same remedy being pursued in that suit. The defendant has not argued that the plaintiff could and should seek an administrative remedy in this case. Moreover, there is no evidence that any regulatory body has the authority to compensate the plaintiff for its injuries.

[19] We note that this is an action brought by an injured consumer and not an LEC. Our decision does not address whether LECs seeking to enter the market may ever bring antitrust suits against the ILEC. In this case, we note that the interconnection agreement requires the parties to the agreement to resolve their disputes through arbitration and the administrative process. *See Order Approving Interconnection Agreement*, 1997 WL 410707, at *23, § 16.

We also note that the Telecommunications Act provides telecommunications carriers with incentives to negotiate interconnection agreements and utilize the regulatory process. ILECs who wish to enter the long distance market are required to meet certain requirements. Some of those requirements can be met by successfully negotiating an interconnection agreement. *See* 47 U.S.C. § 271(c)(2)(A)(i)(I). The LEC may have the incentive to proceed through negotiating such an agreement because the regulatory process is likely to provide access to the local network sooner than the court system. Thus, we do not believe that allowing antitrust actions by injured consumers to proceed will necessarily cause telecommunications carriers to avoid the regulatory process.

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222 (1966) (noting that award of treble antitrust damages would not interfere with future action by regulatory agency).

On the other hand, the possibility of injunctive relief in this case may be more problematic than an award of damages. Courts may not be suited to order particular actions by telecommunications carriers to make the local markets more competitive, particularly when there is a specific regulatory scheme meant to serve the same purpose. An overly broad injunction might interfere with the regulatory framework. But this is not a reason to dismiss the suit at this stage, especially because the plaintiff may no longer be asserting claims for injunctive relief. The possibility of an injunction that conflicts with the regulatory framework will not be an issue until the end of the litigation if there is a finding of liability. It is possible that court intervention could be appropriate in some limited circumstances. However, courts must be both mindful and wary of the strong possibility that injunctive relief could have the unintended consequence of disrupting the regulatory scheme. We have confidence that courts will exercise their discretion with restraint in any case where such relief is appropriate, consistent with respect for the overarching regulatory regime that Congress has created.

Therefore, we reverse the district court's dismissal of the plaintiff's antitrust claim.

CONCLUSION

For the reasons stated above, we affirm the district court's dismissal of the plaintiff's section 251 claim. The judgment of the district court is vacated with respect to its dismissal of the plaintiff's other claims, and the case is remanded for further proceedings consistent with this opinion.

SACK, *Circuit Judge*, concurring in part and dissenting in part.

I concur with the majority's resolution of the plaintiff's appeal with respect to its claims under § 2 of the Sherman Act and § 202 of the Communications Act. I write briefly and separately to make an observation as to these. I respectfully dissent, however, with regard to the majority's disposition of the appeal of the dismissal of the plaintiff's claim under § 251 of the Telecommunications Act, which I would remand to the district court for further consideration.

I. The Sherman Act Claim

I concur with the majority's disposition of the appeal with respect to the antitrust claim. I write separately to emphasize the extent to which, in my view, the procedural posture of the case may influence the outcome of this appeal.

The plaintiff alleges in its amended complaint that:

> Throughout the [relevant p]eriod, [the defendant] has not afforded [competing local exchange carriers ("CLECs")] access to the local loop on a par with its own access. Among other things, [the defendant] [1] has filled orders of CLEC customers after filling those for its own local phone service, [2] has failed to fill in a timely manner, or not [sic] at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and [3] has systematically failed to inform CLECs of the status of their customers' orders with [the defendant].

Am. Compl. at ¶ 21. The plaintiff further alleges:

> On March 9, 2000, after Plaintiff retained counsel to investigate and pursue its claim, [the defendant] agreed to pay a $3 million fine to the U.S. Treasury pursuant to a consent decree entered into between [the defendant]

> and the Federal Communications Commission arising out of [the defendant's] failure to provide adequate access to Local Phone Service competitors in New York to the level required when the Federal Communications Commission allowed [the defendant] to offer long-distance telephone service to New Yorkers and to pay $10 million in compensation to competing Local Phone Service providers in New York for injury caused to them as a result of [the defendant's] misconduct in handling orders from such competing Local Phone Service providers.

Am. Compl. at ¶ 22. Elsewhere in its amended complaint, the plaintiff asserts that the defendant's conduct injured it. Am. Compl. ¶ 23.

Additionally, in its original complaint, in connection with its allegations concerning Section 251 of the Telecommunications Act, the plaintiff made allegations, parallel to those contained in ¶¶ 21 and 22 of the amended complaint, Compl. ¶¶ 31, 32, consisting of quotations of "obligations" imposed on incumbent local exchange carriers ("ILECs") under the Act, and assertions that the defendant did not fulfil these "obligations."

The defendant responds, however, that this litigation is about only a single sequence of events referred to in the third clause of paragraph 21 and in paragraph 22 of the amended complaint and similar allegations in the original complaint. As the defendant describes these events:

> In the weeks that followed the approval of the New York long-distance application, [the defendant] encountered a problem with the computer systems it adopted (the "operation support systems" or "OSS") to satisfy the regulators' demands during the long-distance-approval process. The problem affected the ability of competitors who had placed orders with [the defendant] to receive an

> electric confirmation notification that their orders were being processed. AT&T and others immediately filed complaints with the FCC and with the New York PSC. On March 9, 2000, the defendant entered a consent decree with the FCC resolving the matter by ensuring prompt cure of the problem and payment of $3 million to the United States and $10 million to AT & T and other competitors for their losses.... Just a few months later, in July 2000, with the problem fixed, the FCC dissolved the consent decree.

Appellee's Br. at 9; *see also In the Matter of Bell Atlantic*, 15 F.C.C.R. 5413, 2000 WL 571154 (2000) (consent decree).

The defendant thus insists that this case concerns a computer malfunction that led to a failure to confirm orders by AT & T to the defendant, and no more. The defendant further underscores the fact that it has already paid ten million dollars to CLECs, including AT & T, to compensate them for the injury that they suffered as a result, and $3 million to the FCC as a sanction for any misconduct for which the defendant is responsible. If indeed the plaintiff's claim rests only on the order confirmation failure, and the evidence shows that service lapses were temporary and a consequence of technical flaws alone, it may be that summary judgment will ultimately be available to the defendant on the Sherman Act claim. Evidence of service lapses, absent other indicia of predatory conduct, may not be enough to establish an attempt to injure competition or gain a competitive advantage.

But the district court dismissed the complaint under Fed.R. Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted," and it is premature to conclude that the plaintiff cannot establish that the failure to provide prompt order confirmations was not a technical problem, but rather an attempt to fend off competition in the local service market from AT & T or other CLECs. It is also too early to be sure that the plaintiff cannot establish that, independent of

confirmation delays, the defendant delayed filling orders of CLECs' customers, but not those of its own customers, or failed to fill orders for CLECs' customers at all, thus injuring competition or gaining a competitive advantage, as the plaintiff also alleges. Should the plaintiff be able to establish the existence of such circumstances, I see no bar to its Sherman Act claim.

Upon a Rule 12(b)(6) motion, dismissal is not warranted unless "no relief could be granted under *any* set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (emphasis added); *accord In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001). Relief can be awarded in this case under a set of facts consistent with the allegations in the complaint, even if the existence of those facts may seem somewhat doubtful.

II. Section 251 of the Telecommunications Act

I find the majority's approach to the plaintiff's § 251 claim, majority opinion, ante at [16a-25a], generally well thought out and well articulated, and agree that the district court's resolution of the issue was erroneous. But the ground on which the majority affirms the judgment of the district court is different from that relied upon by the district court and those discussed by the parties on appeal. As far as I can determine, moreover, no other circuit has considered this precise question. Especially in light of the fact that the plaintiff's other claims are being returned to the district court, I would return the § 251 claim for further exposition by the parties and consideration by that court.

The § 251 claim is set forth only in the plaintiff's original complaint. As noted previously, part of the plaintiff's pleading in this regard is a verbatim recitation of the defendant's "[o]bligations [as a] local exchange carrier[ ]" under § 251(b), and its "[a]dditional obligations [as an] incumbent local exchange carrier[ ]" under § 251(c). Compl. at ¶¶ 45-49.

I think that insofar as the district court dismissed these allegations, that dismissal must be affirmed. "[S]weeping legal conclusions cast in the form of factual allegations" do not suffice to state a claim even at the Rule 12(b)(6) stage. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990). "While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996).

The remainder of the plaintiff's § 251 claim is based on allegations in the original complaint parallel to those in §§ 21 and 22 of the amended complaint set forth above.

> [The defendant] [1] has fulfilled orders of other Local Phone Service providers' customers after fulfilling those for its own Local Phone Service providers' customers, [2] has failed to fill a substantial number of orders for other Local Phone Service providers' customers substantially identical in circumstances to its own Local Phone Service customers for whom it has filled orders, and [3] has systematically failed to inform other Local Phone Service providers of the status of their orders with [the defendant] concerning their (the other Local Phone Service providers') customers.

Compl. at ¶ 31.

CLECs' customers' "orders" are doubtless "telecommunications services" within the meaning of the Telecommunications Act. *See* 47 U.S.C. § 153(46) (defining "telecommunications services" to include "the offering of telecommunications for a fee directly to the public"). Delayed and unfulfilled orders of CLECs' customers—if both their existence and their unreasonable discriminatory nature can be established by the plaintiff in the district court—implicate the defendant's duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of

its telecommunications services" under § 251(b)(1) and § 251(c)(4)(B). The allegations in the complaint *also* include facts that would constitute violations of the interconnection agreement between AT & T and the defendant: The agreement states that the defendant "will make available to AT & T . . . the Telecommunications Services (As Defined in the Act) that it provides at retail to its non-carrier subscribers." *Order Approving Interconnection Agreement*, 1997 WL 410707, at *41 (N.Y. Pub. Serv. Comm'n June 13, 1997). Among the services the defendant must provide are "residence orders" and "business orders." *Id.* Any violation of the interconnection agreement thus also arises out of provisions of the agreement that implement § 251.

The majority notes that "section 251 envisions that [the enumerated] duties will be implemented through contracts between . . . carrier[s]." Majority opinion, ante at [21a-22a]. It then observes that interconnection agreements "may [be] *negotiate[d]* . . . without regard to the standards set forth in subsections (b) and (c) of section 251." Majority opinion, ante at 321 (quoting 47 U.S.C. § 252(a)(1)) (emphasis in original omitted; emphasis added). From this provision, the majority infers that "Congress envisioned the possibility that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute," rendering § 251 "superfluous." Majority opinion, ante at [23a]. Hence, the majority concludes, no § 207 right of action obtains for violations of § 251.

I hesitate to accept the conclusion that the presence of a partially negotiated interconnection agreement here renders the duties of the defendant enumerated in § 251 "superfluous." Section 252(a)(1), upon which the majority relies, refers only to portions of agreements that are "negotiate [d]." *Id.* But "[a]greements can be formed in two different ways: voluntary negotiation or compulsory arbitration." *Bellsouth Telecommunications Inc. v. MCImetro Access Transmission*

Servs., Inc., 278 F.3d 1223, 1228 (11th Cir. 2002). An agreement may further contain a mix of negotiated portions and arbitrated portions. *See* 47 U.S.C. § 252(e)(2)(A) (referring to "portion[s]" of an agreement that are negotiated). Section 252(a)(1) does not cover provisions reached by compulsory arbitration under § 252(b). The interconnection agreement between AT & T and the defendant here was, at least in part, "arrived at through compulsory arbitration." *Order Approving Interconnection Agreement*, 1997 WL 410707, at *1.

Sections of interconnection agreements reached through arbitration, unlike negotiated sections, must contain limitations on the behavior of an ILEC congruent with those contained in § 251. *See Verizon Communications, Inc. v. FCC*, ___ U.S. ___, 122 S.Ct. 1646 (2002); *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 372-73 (1999); *U.S. West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241, 1244-45 (10th Cir. 2002); *MCI Telecommunication Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 500-01 (3d Cir. 2001). All interconnection agreements, whether reached by negotiation or arbitration, must be approved by state commissions, 47 U.S.C. § 252(e)(1); *Bellsouth Telecommunications*, 278 F.3d at 1228, but the basis on which they may be rejected differs. A negotiated section of an agreement may be rejected only if it "discriminates against a . . . carrier not a party to the agreement" or if it "is not consistent with the public interest." 47 U.S.C. § 252(e)(2)(A). An arbitrated section of an agreement, by contrast, may be rejected only on the ground that it "does not meet the requirements of section 251." *Id.* § 252(e)(2)(B).

In the instant case, the New York Public Service Commission (the "Commission"), to determine whether it should reject or endorse the agreement, inquired whether "the *entire* Agreement" met, *inter alia*, "the requirements of § 251." *Order Approving Interconnection Agreement*, 1997 WL

410707, at * 1 (emphasis added). The Commission determined that "[p]ursuant to the standard enunciated in § 252(e)(2)(B)"—*i.e.*, the § 251 duties—the interconnection agreement did "not violate the requirements of the Act." *Id.* at *3. The entire interconnection agreement here is thus tied closely to the specific requirements of § 251, even though portions of negotiated agreements may not be in all cases.

Section 207 provides a right of action based on "any act" that a carrier is "required" to do. 47 U.S.C. §§ 206 & 207. The majority identifies no explicit abrogation of this unequivocal language in the context of duties under § 251. As a practical matter, carriers execute such duties when fulfilling arbitrated portions of interconnection agreements because the latter identify specific means of meeting the general duties enunciated in § 251. Indeed, even the fulfillment of an entirely negotiated agreement *might* also perhaps be construed as being an "act . . . required to be done" by the Act.[1] I am therefore reluctant either to endorse the majority's logic, or to conclude that all interconnection agreements, or only arbitrated portions thereof, should give rise to § 207 rights of action. Absent briefing on practical matters, such as the actual frequency of conflicting duties under § 251 and interconnection agreements, and the difficulty of distinguishing negotiated from arbitrated portions of agreements, I am hesitant to guess at how in practice interconnection

---

[1] It is not clear that § 251 duties are entirely displaced even by negotiated agreements in all instances. At least one circuit court has concluded that even agreements "negotiated and agreed upon 'with regard' to the 1996 Act and law thereunder," although not arbitrated, may be judicially altered to conform with § 251 and regulations issued thereunder. *AT & T Communications of the S. States, Inc. v. Bellsouth Telecommunications, Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Not even negotiation, then, necessarily removes an interconnection agreement from § 251's force.

agreements interact with the duties specified in § 251, and to avoid a statutory command based on what seem to me to be suppositions.

Although the record does not allow us to determine whether portions of the agreement allegedly violated here were arbitrated or negotiated, we know that the *entire* agreement fulfilled § 251. The obligations of the defendant contained in the interconnection agreement that the plaintiff alleges have been breached may therefore exist solely because the agreement must conform to the provisions of § 251. Perhaps then the defendant's alleged failure to fulfil the obligations were, under § 206 of the Act, "act[s], matter[s], or thing [s] [in the Telecommunications Act] required to be done [by the Act]" that would, contrary to the majority's conclusion, support a right of action under § 207 of the Act.

I would therefore remand for consideration of this issue in the first instance by the district court. An opinion by the learned district judge, a well-developed factual record, and proper briefing cannot but aid in our resolution of this complex and difficult issue. I therefore respectfully dissent from the majority's disposition of it.

III. Section 202

Finally, subject to observations similar to those contained in Section I of this concurrence about the antitrust claims, I concur with the majority's conclusion as to the plaintiff's claims under § 202 of the Communications Act.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Dec. 6, 2000]

No. 00 Civ. 1910(SHS)

LAW OFFICES OF CURTIS v. TRINKO, LLP,
Individually and on Behalf of Themselves
and All Others Similarly Situated,
Plaintiff,

v.-

BELL ATLANTIC CORP.,
Defendant.

OPINION AND ORDER

STEIN, *District Judge*.

Defendant Bell Atlantic Corp. has moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that plaintiff lacks standing and that the complaint fails to state a claim. For the reasons set forth below, that motion is granted, with leave to replead in part.

I. BACKGROUND

Pursuant to the Telecommunications Act of 1996, local telephone companies may enter the market for long-distance telephone service provided they face competition in the local telephone service market. 47 U.S.C. § 271(c). To promote development of competition in local telephone service markets, the Act requires that incumbent local telephone companies provide certain services to new entrants, including permitting access to the incumbent local telephone

company's network by the new entrant—called "interconnection"—and providing retail services to new entrants at wholesale rates. 47 U.S.C. § 251(c).

According to the complaint, Bell Atlantic, an incumbent local telephone company, applied for and received regulatory approval to offer long-distance telephone service in certain parts of the Northeast. Compl. ¶ 11. Bell Atlantic has allegedly not, however, assisted its local phone service competitors as required by the Telecommunications Act. *Id.* ¶ 12. Instead, Bell Atlantic is alleged to have:

> fulfilled orders of other Local Phone Service providers' customers [only] after fulfilling those for its own Local Phone Service, has failed to fill a substantial number of orders for other Local Phone Service providers' customers substantially identical in circumstances to its own Local Phone Service customers for whom it has filled orders, and has systematically failed to inform other Local Phone Service providers of the status of their orders with Bell Atlantic concerning [the Local Phone Service providers'] customers.

Id. ¶ 31.

On March 9, 2000, the Federal Communications Commission ("FCC") issued a consent decree in which Bell Atlantic agreed to pay a $3 million fine to end an investigation into its alleged failure to provide adequate access to local phone service competitors in New York. *Id.* ¶ 32; *Bell Atlantic—New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rec. 5413, 2000 WL 571154 (2000). Bell Atlantic also agreed to pay $10 million to competing local telephone service providers for injuries resulting from its misconduct in handling their orders. Compl. ¶ 32.

The next day, the Law Offices of Curtis V. Trinko, LLP, a law firm organized as a limited liability partnership under New York law and a customer of one of Bell Atlantic's competitors in the local telephone service market, filed this action on behalf of itself and all others similarly situated. The Trinko partnership alleges that the members of the class have been damaged by Bell Atlantic's provision of "a level of service that is materially below the level that is accorded customers of Bell Atlantic's Local Phone Service in functionally identical circumstances." *Id.* ¶ 12. The complaint asserts a claim for unlawful monopolization in violation of section 2 of the Sherman Act, claims for violations of section 251 and 202 of the Communications Act, and a claim for tortious interference with contract. The complaint alleges that the relevant market is the provision of local, non-wireless telephone service in those areas in which Bell Atlantic is the "incumbent local exchange carrier" within the meaning of the 1996 Telecommunications Act, and that Bell Atlantic possesses monopoly power in that market. *Id.* ¶¶ 18-25.

Bell Atlantic now moves for dismissal of the complaint in its entirety on the grounds that the Trinko partnership lacks standing to bring the Sherman Act claim and the Communications Act claims, that plaintiff's Communications Act claims are not cognizable, that plaintiff has failed to state a claim for tortious interference with contract, that plaintiff has not sufficiently pled damages, and that all of plaintiff's claims for damages are barred by the filed tariff doctrine.

II. DISCUSSION

When deciding a motion to dismiss a claim pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all of the well-pleaded facts as true and draw all reasonable inferences from those allegations in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint will survive a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. *The Sherman Act Claim*

Bell Atlantic contends that because its alleged anti-competitive conduct is violating its duties to competing carriers under the Telecommunications Act, any injury suffered by the alleged class, as customers of those carriers, "is, by definition, indirect and derivative of the competing carriers' alleged direct market injury." Def.'s Mem. at 12. Thus, according to defendant, the Trinko partnership lacks standing to pursue its Sherman Act claim. Bell Atlantic also argues that to hold otherwise would subject it to the risk of duplicative recovery, *i.e.*, Bell Atlantic might have to compensate both the new entrants into the local telephone service market and their customers for the same harm, assuming liability exists in the first place.

Courts have consistently held that both competitors and consumers may assert antitrust claims arising from harms that flow from anticompetitive conduct. *E.g., SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) ("[T]he presumptively 'proper' [antitrust] plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market."); *Continental Orthopedic Appliances, Inc. v. Health Insurance Plan of Greater New York*, 956 F.Supp. 367, 372 (E.D.N.Y. 1997) ("To have standing, a plaintiff must be a competitor, participant, supplier or consumer in the relevant market."). Indeed, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), upon which Bell Atlantic itself relies, the United States Supreme Court found that the plaintiff lacked standing because it "was neither a consumer nor a competitor in the market in which trade was restrained." 459 U.S. at 539. Plaintiff, as a consumer in the alleged relevant market, has standing to assert an antitrust claim.

Bell Atlantic cites the United States Supreme Court decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), for the proposition that permitting the Trinko partnership to maintain this action would impermissibly subject Bell Atlantic to the risk of duplicative recovery. However, the issue in *Illinois Brick* was whether "indirect purchasers," *i.e.*, customers of the monopolists' customers, could maintain an action on the theory that all of the harm—supracompetitive prices—had been passed on to them. *Illinois Brick*, 431 U.S. at 726-28. The Supreme Court held that suits by such "indirect purchasers" were barred by the rule announced in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), prohibiting antitrust defendants from introducing evidence that the antitrust plaintiff had passed on an illegal overcharge to others. *Illinois Brick*, 431 U.S. at 745-47. The Court explained that permitting suits by indirect purchasers "inject[ed] extremely complex issues into the case" as follows:

> Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.

Id. at 745.

These problems of apportionment are not present here. Any harm to Bell Atlantic's competitors would be harms from artificial barriers to entry into the market place, *e.g.*, lost profits from customers either lost or never obtained because of Bell Atlantic's alleged misconduct. The plaintiff and other class members, though, were, by definition, not lost customers, but customers from whom the competitors presumably profited in spite of Bell Atlantic's misdeeds. The harm

that these customers are alleging—damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully—is wholly distinct from the harm suffered by the competitors. The rule of *Illinois Brick* does not apply to this case.

Even though plaintiff has standing, however, its antitrust claim must nevertheless be dismissed because the Trinko partnership has not pled facts that would entitle it to relief. *See Conley*, 355 U.S. at 45-46. The elements of a monopolization claim under section 2 of the Sherman Act are: (1) possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of that power, as distinguished from "business growth or development as a consequence of superior product, business acumen or historic accident." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97 (2d Cir. 1998) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The complaint fails to establish the second element.

The complaint points to only one act or series of acts taken by Bell Atlantic to maintain its monopoly power. Bell Atlantic's failure to cooperate with local competitors as required by 47 U.S.C. § 251. Even a monopolist, however, has no general duty under the antitrust laws to cooperate with competitors. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985); *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988). Indeed, because all competition necessarily involves impairing the opportunities of rivals, liability under the antitrust laws arises only when such impairment "does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605 n. 32; *see also United States Football League*, 842 F.2d at 1359.

The affirmative duties imposed by the Telecommunications Act are not coterminous with the duty of a monopolist to refrain from exclusionary practices. *Goldwasser v. Ameritech*

Corp., 222 F.3d 390, 400 (7th Cir. 2000). Moreover, the mere fact that a monopolist has violated another statute does not transform such offense into a violation of the antitrust laws. *Id.* Thus, plaintiff has failed to allege any "willful acquisition or maintenance" of monopoly power by Bell Atlantic. *See Tops Markets*, 142 F.3d at 97. Plaintiff's antitrust claim is dismissed.

B. *Communications Act Claims*

The Communications Act provides, in relevant part, that:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206. The Act also provides that "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter ... may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction." 47 U.S.C. § 207.

The Trinko partnership has brought two claims pursuant to those sections. First, it claims that it and the other class members have been damaged by Bell Atlantic's failure to meet the obligations imposed on it by 47 U.S.C. § 251 to cooperate with competing local carriers, as discussed above. Second, the Trinko partnership claims that it and the other

class members have been damaged by Bell Atlantic's unlawful discrimination in services between its customers and customers of its local competitors in violation section 202(a) of the Act, which provides that:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in . . . services . . . , directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a).

1. *Cognizability*

Bell Atlantic contends that these claims are not cognizable. It notes that sections 206 and 207 were part of the original 1934 Communications Act, and argues that violations of provisions of the 1996 Telecommunications Act, such as section 251, cannot form the basis of a section 207 claim because those claims would interfere with the overarching regulatory scheme of the 1996 Act. Thus, says Bell Atlantic, no court has ever recognized an action pursuant to section 207 based on a violation a provision of the 1996 Act. Bell Atlantic further argues that because the Trinko partnership's claim based on an alleged violation of section 20—a provision of the 1934 Act--is based on the same conduct that forms part of its claim based on violation of section 251, it, too, must not be cognizable lest plaintiffs "circumvent" the regulatory process prescribed by the 1996 Act.

However, violations of the 1996 Act can form the basis for liability pursuant to sections 206 and 207. As the Supreme Court has noted, "the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, [the 1934 Act]." *AT & T Corp. v. Iowa Utilities Bd.*,

525 U.S. 366, 378 n.5 (1999). Accordingly, when Judge Ward of this district considered a suit pursuant to sections 206 and 207 based on a violation of another provision of the 1996 Act, he recognized that "plaintiffs do have a private right of action under Sections 206 and 207 of the Telecommunications Act for damages suffered as a result of a violation of the [1996] Act." *Conboy v. AT & T Corp.*, 84 F.Supp.2d 492, 500 (S.D.N.Y. 2000).

Moreover, contrary to Bell Atlantic's position, suits by consumer plaintiffs are not *per se* incompatible with the regulatory scheme of the 1996 Act. Any incompatibility must be evaluated on a case-by-case basis and will depend on the specific provision alleged to have been violated as well as the identity of the party asserting the claim.

In this case, the specific provision of section 251 that Bell Atlantic is alleged to have violated is 47 U.S.C. § 251(c)(2)(C), which details an incumbent carrier's duty to provide "interconnection . . . that is at least equal in quality to that provided by the local exchange carrier to itself . . . or any other party to which it provides interconnection." The parties asserting the claim are customers of interconnected carriers. Such a claim does not directly implicate the regulatory scheme Congress created to govern the formation of interconnection agreements. *See* 47 U.S.C. § 252. Thus, the cases relied on by Bell Atlantic involving potential competitors attempting to circumvent the provisions of 47 U.S.C. § 252 are inapposite. *See Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, No. 99 CIV. 4915, slip op., (E.D.N.Y. April 17, 2000), *Indiana Bell Tel. Co. v. McCarty*, 30 F.Supp.2d 1100, 1104 (S.D.Ind. 1998).

To the extent that this or a similar claim might indirectly implicate the regulatory scheme, the filed tariff doctrine and the doctrine of primary jurisdiction are available to insure that judicial action is consistent with the regulatory process. *See, e.g., Oh v. AT & T Corp.*, 76 F.Supp.2d 551, 554-58

(D.N.J. 1999). Application of these doctrines on a case-by-case basis is superior to a *per se* rule that would have courts disregard the explicit provision of a private right of action in 47 U.S.C. § 207. *Contra Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at *10 (N.D.Ill. Feb. 4, 1998) ("[B]ecause of the potential for frustrating the goals of the 1996 Act, Plaintiffs should not be permitted standing" to assert a section 207 claim based on a violation of section 251.), *aff'd on other grounds*, 222 F.3d 390 (7th Cir. 2000). Similarly, *AT & T Communications of Cal., Inc. v. Pacific Bell*, 60 F.Supp.2d 997 (N.D.Cal. 1999), on which Bell Atlantic relies, does not provide it with adequate succor. The holding in that case is that an implied right of action does not exist pursuant to section 206. 60 F.Supp.2d at 1000. In this case, plaintiff is proceeding pursuant to the explicit private right of action created by section 207, not an implied private right of action.

Plaintiff's other section 207 claim is based on a violation of section 202(a). Defendant does not point to a regulatory regime specific to section 202(a), but contends instead that because the section 202(a) claim "is based on the very same conduct as Plaintiff's section 251 claim," the section 202(a) claim would impermissibly interfere with the regulatory process in the same manner as the section 251 claim. Def.'s Mem. at 8. Because the Court rejects Bell Atlantic's argument as to the section 251 claim, its argument as to the section 202(a) claim is rejected as well.

2. *Standing*

Bell Atlantic next argues that the Trinko partnership lacks standing to bring the Communications Act claims because the rights created by sections 251 and 202 do not belong to plaintiff, but instead belong to the competing local carriers. Thus, Bell Atlantic maintains, any injury suffered by plaintiff

and other class members is indirect and derivative of the injury suffered by the competing local carriers through defendant's alleged violation of those rights.

"The doctrine of standing incorporates both constitutional and prudential limitations on federal court jurisdiction." *Wight v. Bankamerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000) (quoting *Lamont v. Woods*, 948 F.2d 825, 829 (2d Cir. 1991)); *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). The constitutional dimension, which derives from the "case or controversy" requirement of Article III, *see Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1106 (2d Cir. 1992), "requires the party invoking the power of a federal court to have at least a 'personal stake in the outcome of the controversy.'" *Wight*, 219 F.3d at 86 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984).

There are also several judicially created "prudential" requirements. *Lamont*, 948 F.2d at 829. These rules of judicial self-restraint are applied to further preserve a "'proper—and properly limited—role of the courts in a democratic society.'" *Allen*, 468 U.S. at 750 (quoting *Warth*, 422 U.S. at 498); *see also Sullivan*, 962 F.2d at 1106. "Foremost among the prudential requirements is the rule that a party must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Wight*, 219 F.3d at 86 (quoting *Warth*, 422 U.S. at 499). Properly understood, the "prudential" limit on standing to raise the claims of another is a canon of statutory interpretation that raises a presumption against such standing, which presumption Congress is free to override. *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C.Cir. 1994).

Applying these principles to this case, plaintiff has satisfied the constitutional standing requirements. As discussed above, the Trinko partnership has alleged injuries to itself and other

class members, which injuries give it the "personal stake in the outcome of the controversy" that Article III demands. *See Warth*, 422 U.S. at 498.

The prudential standing requirements are another matter. Section 251 imposes duties on incumbent carriers only as to local competitors, and those rights are triggered only when a competing carrier requests interconnection. 47 U.S.C. §§ 251, 252. Thus, the Trinko partnership's section 251 claim is not a claim for damages resulting from a violation of its rights, but rather a claim for damages resulting from a violation of a third party's rights, *i.e.*, the rights of the Trinko partnership's local telephone company. Because the rule that a party cannot rest his claim to relief on the legal rights or interests of third parties is the "foremost" tenet of prudential standing, *Wight*, 219 F.3d at 86, the Trinko partnership's section 207 claim based on a violation of section 251 must be dismissed.

The duties imposed on carriers by section 202(a), on the other hand, do not apply only to "competitors", but instead apply more broadly to "any particular person, class of persons, or locality" to which that carrier provides service. 47 U.S.C. § 202(a). Thus, if plaintiff and other class members receive service from Bell Atlantic, it owes them duties of non-discrimination pursuant to section 202(a) even if Bell Atlantic is acting on behalf of its competitors pursuant to an interconnection agreement. If defendant has breached such duties, the Trinko partnership's damages flowing from that breach arise from a violation of its rights, and not the rights of any third party.

The complaint, however, contains no allegation that the Trinko partnership or any other class member receives any service directly from Bell Atlantic. Instead, the Trinko partnership alleges that Bell Atlantic has failed to provide non-discriminatory service to its competitors. *E.g.*, Compl. ¶ 31. Accordingly, plaintiff's section 207 claim based on

violations of section 202(a) is dismissed with leave to replead the direct provision of services by Bell Atlantic to the Trinko partnership and other class members on discriminatory terms.

3. *Other Arguments*

Having dismissed plaintiff's Communications Act claims for lack of standing, the Court need not address Bell Atlantic's arguments that the Trinko partnership has failed to sufficiently plead damages and that its claims are barred by the filed tariff doctrine.

C. *Tortious Interference Claim*

As this Court has dismissed all of plaintiff's federal claims, there remains no independent basis for federal jurisdiction over the remaining state law claim for tortious interference. That claim, therefore, is dismissed. *See* 18 U.S.C. § 1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *Baylis v. Marriott Corp.*, 843 F.2d 658, 665 (2d Cir. 1988). Accordingly, the Court need not address Bell Atlantic's arguments that the Trinko partnership has failed to state a claim for tortious interference and that the claim is also barred by the filed tariff doctrine.

III. CONCLUSION

For the reasons set forth above, the motion to dismiss the complaint is granted. Plaintiff may replead its Communications Act claim based on defendant's alleged violation of 47 U.S.C. § 202(a) as well as its supplemental claim for tortious interference with contract within 20 days of this Opinion and Order.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

00 Civ.1910

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Individually and on Behalf of Themselves and
All Others Similarly Situated,
Plaintiff,

-against-

BELL ATLANTIC CORP.,
Defendant.

ORDER

SIDNEY H. STEIN, U.S. District Judge.

Plaintiff Law Offices of Curtis V. Trinko, LLP, brought this putative class action for alleged violations of the Sherman Act, the Communications Act, and state law arising from defendant Bell Atlantic Corp.'s allegedly discriminatory treatment of both competitors in the market for local telephone service and the competitors' customers. After this Court dismissed plaintiff's complaint with leave to replead a claim pursuant to section 202 of the Telecommunications Act and a claim for tortious interference with contract, *see Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp.,123* F. Supp. 2d 736 (S.D.N.Y. 2000) ("*Trinko I*"), and subsequently granted plaintiff's request to replead a claim pursuant to the Sherman Act, *see* Order of January 5, 2001, plaintiff filed an Amended Complaint dated January 19, 2001. Familiarity with *Trinko I* and the January 5, 2001, Order are presumed. Bell Atlantic now moves pursuant to Fed.R.Civ.P.12(b)(6) to

dismiss the Amended Complaint for failure to state a claim. For the reasons set forth below, Bell Atlantic's motion is granted.

I. BACKGROUND AND FACTS

The Amended Complaint alleges essentially the same relevant facts as were set forth in *Trinko I*. The Trinko partnership has also made the following additional allegations and clarifications in an effort to address the inadequacies of tis earlier complaint:

The Amended Complaint now alleges explicitly that "[p]laintiff and the other members of the Class use Bell Atlantic's local loop when they obtain local phone service from the CLECs [i.e., competing local exchange carriers]." Am Compl. ¶ 25. In addition, it now describes the relationship between the CLECs, their customers, and Bell Atlantic as follows:

> Plaintiff's local phone service requires access to and the provision by Bell Atlantic of services on Bell Atlantic's local loop, as does the local phone service of Plaintiff's fellow class members. Such access and the provision of such services is arranged by its CLEC, which has entered into an agreement with Bell Atlantic pursuant to which Bell Atlantic is obligated to afford the CLEC access to and services on the local loop on the same terms as are afforded to its (Bell Atlantic's) own local phone service customers. In each such case, the CLEC acts as the agent for its customers . . . in arranging with Bell Atlantic for suc access or the provision of such services.

Id. ¶24.

With respect to the allegations of anticompetitive conduct in violation of the Sherman Act, the Amended Complaint now alleges that Bell Atlantic "induced CLECs to attempt to enter into the Local Phone Service market" by entering into resale agreements, then breached those agreements with the purpose of acquiring or maintaining monopoly power in the local phone service market. *Id.* ¶¶ 54-58.

II. DISCUSSION

When deciding a motion to dismiss a claim pursuant to Fed. R. Civ. P. 2(b)(6), a court must accept all of the well-pleaded facts as true and draw all reasonable inferences from those allegations in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint will survive a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)

A. *The Communications Act Claim*

In *Trinko I*, this Court held that section 202(a) of the Communications Act imposes duties of non-discrimination on common carriers, such as Bell Atlantic, with respect to "any particular person, class of persons, or locality' to which that carrier provides service." 123 F. Supp. 2d at 744. Because the original complaint pled the discriminatory provision of services to CLECs, rather than to the Trinko partnership and other class members, the Court held that the Trinko partnership lacked standing to assert the claims as pled. *Id.* at 744-45. However, the Court granted the Trinko partnership leave to replead "the direct provision of services by Bell Atlantic to the Trinko partnership and other class members on discriminatory terms." *Id.* at 745.

The partnership has now explicitly pled that it uses Bell Atlantic's local loop when obtaining local phone service from its CLEC. In other words, Bell Atlantic provides access to a CLEC to the Trinko partnership via a local loop. As the Trinko partnership concedes, however, "the Amended Complaint challenges not the provision of 'access' but the provision of specific services . . . ." Pl.'s Mem. at 4. Thus, the discrimination complained of by the Trinko partnership is not the discriminatory provision of local loops, but rather the allegedly discriminatory provision of services necessary to the

CLECs' provision of telephone service to their customers. *See* Am. Compl. ¶ 21.

The Trinko partnership acknowledges in the complaint that the services at issue are provided by Bell Atlantic to CLECs—rather than to the CLECs' customers—pursuant to agreements by which "Bell Atlantic is obligated to afford the CLEC access to and services on the local loop." Am. Compl. ¶ 24. It contends, however, that the CLECs are merely acting as "agents" for their customers in arranging for Bell Atlantic to provide those services to the CLECs' customers. *Id.* But the Trinko partnership has failed to plead any facts supporting the bare allegation of a principal-agent relationship. There is no allegation that the CLECs' customers were billed by Bell Atlantic for the services in question, nor is there any indication that in obtaining the services, the CLECs consented to act subject to their customers' direction and control, and the customers consented to exercising control over the CLECs. Cf. *Global Entm't, Inc. v. New York Tel. Co.*, No. 00 Civ. 2959, 2000 WL 1672327, at *6 (S.D.N.Y. Nov. 6, 2000). Accordingly, the discrimination alleged in the complaint was directed at the CLECs, and not the CLECs' customers.

The Trinko partnership next contends that even if the discrimination were directed at the CLECs, it and the other class members have suffered "indirect" discrimination that is cognizable pursuant to provisions of 47 U.S.C. § 202(a) prohibiting "discrimination in charges . . . or services . . . directly or indirectly" or "subject[ing] any particular person [or] class of persons . . . to any undue or unreasonable prejudice or disadvantage." Despite section 202(a)'s broad language, however, courts have applied the statute only where a common carrier has offered the same services at different prices to different customers, or has offered some customers less service at the same price it has offered other customers better service. *See, e.g., Nat'l Comm., Ass'n v. AT&T Corp.*, 238 F.3d 124,

125-26 (2d Cir. 2001); *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058,1064 (D.C. Cir. 1993) ("Section 202(a) is designed to prevent a carrier from granting a discount to one (usually large) user that it would not grant were the same or a "like" service purchased by another (usually small) customer."). Accordingly, the Court reaffirms its holding in *Trinko I* that the duties imposed on carriers by section 202(a) apply only to those to whom that carrier provides service. 123 F. Supp. 2d at 744-45. Thus, the Trinko partnership's section 202(a) claims are based on "damages resulting from a violation of a third party's rights" and must be dismissed. *Id.* at 744 (quoting *Wight v. Bankamerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000).

B. *The Sherman Act Claim*

The gravamen of the Trinko partnership's repled Sherman Act claim is identical to that of the claim dismissed in *Trinko I*: Bell Atlantic breached its agreements with CLECs entered into pursuant to 47 U.S.C. §§ 251 and 252 for the purpose of hindering the CLECs ability to compete in the market for local telephone service. At its core, the partnership's claim is that "when a firm with enough market power breached the terms of contracts it has with competitors that assist those competitors . . . and it does so with the intent to hinder the ability of those competitors to compete in that market, it violates section 2 of the Sherman Act." Pl.'s Mem. at 6.

As the Court has previously noted, however, "even a monopolist . . . has no general duty under the antitrust laws to cooperate with competitors." *Trinko I*, 123 F. Supp. 2d at 741-42 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472, U.S. 585, 600 (1985); *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988)). Similarly, there is no general duty that requires a monopolist who has given assistance to a competitor to continue that assistance. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.* 797 F.2d 370, 376 (7th Cir.

1986). Thus, Bell Atlantic's breaches of its contracts with CLECs, even if true, were not "anticompetitive" conduct within the meaning of the antitrust laws. *See id.* at 377-78.

The Trinko partnership's reliance on *Tops Markets, Inc. v, Quality Markets, Inc.* 142 F.3d 90 (2d Cir. 1998), is misplaced. *Tops Markets* involved a firm's attempt to monopolize the local market for supermarkets by interfering with a competitor's contract with a third party, and, thus, does not support the partnership's argument that a monopolist's breach of its own contracts with competitors is anticompetitive conduct.

Nor is this Judge Posner's hypothetical case of a monopolist "entic[ing] new firms into its market only to destroy them and so deter other firms from trying to enter." *See Olympia Equip.*, 797 F.2d at 376. Bell Atlantic entered into the agreements at issue because it was required to do so by the Communications Act, and there is no allegation that it had either the intent or the ability to "destroy" CLECs such as AT & T.

Anticompetitive conduct is an element of both a monopolization claim and an attempted monopolization claim pursuant to section 2 of the Sherman Act. *See Invamed, Inc, v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 218-19 (S.D.N.Y. 1998). Because the Trinko partnership has failed to allege any anticompetitive conduct on the part of Bell Atlantic, its Sherman Act claim must be dismissed. *Id.* at 219.

C. *Tortious Interference Claim*

As this Court has dismissed all of plaintiffs federal claims, there remains no independent basis for original federal jurisdiction over the remaining state law claim for tortious interference. That claim, therefore, is dismissed. *See* 28 U.S.C. § 1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484

U.S. 343, 350 (1988); *Baylis v, Marriott Corps.*, 843 F.2d 658, 665 (2d Cir. 1988).

III. CONCLUSION

For the reasons set forth above, the motion to dismiss the amended complaint is granted.

Dated: New York, New York
April 26, 2001

SO ORDERED:

/s/ Sidney H. Stein
SIDNEY H. STEIN, U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: Oct. 1, 2002]

Dkt. No. 01-7746

LAW OFFICES OF CURTIS V. TRINKO,

Plaintiff-Appellant,

v.

BELL ATLANTIC CORP.,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing *en banc* having been filed herein by the appellee Bell Atlantic Corp.

Upon consideration by the panel that decided the appeals, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing *en banc* been transmitted to the judges for the court in regular active service and to and other judge that heard the appeal and that no such judge has requested that a vote be taken theron.

FOR THE COURT

Roseann B. Mackechine Clerk

APPENDIX E

STATUTORY APPENDIX

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> "**Monopolizing trade a felony; penalty.** Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony * * *."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> "**Suits by persons injured.** (a) Amount of recovery; prejudgment interest. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 202 of the Communications Act, 47 U.S.C. § 202(a), provides:

> "**Discriminations and preferences.** (a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or

> locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Section 206 of the Communications Act, 47 U.S.C. § 206, provides:

> "**Carriers' liability for damages.** In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 207 of the Communications Act, 47 U.S.C. § 207, provides:

> "**Recovery of damages.** Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

Section 251 of the Communications Act, 47 U.S.C. § 251, as added by the Telecommunications Act of 1996, as amended, provides:

> "**Interconnection**
>
> **(a) General duty of telecommunications carriers**

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the Interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the

State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title."

Section 252 of the Communications Act, 47 U.S.C. § 252, provides:

"Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local

exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls

that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court

shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term 'incumbent local exchange carrier' has the meaning provided in section 251(h) of this title."

Section 253 of the Communications Act, 47 U.S.C. § 253, provides:

"Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services."

Section 271 of the Communications Act, 47 U.S.C. § 271, provides:

"Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in

subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is

providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section

252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity

in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programing, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA

transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term 'audio programming services' means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms 'video programming service' and 'other programming services' have the same meanings as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier, shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section."

Section 601(b) of the Telecommunications Act of 1996, codified in Section 152 note of the Communications Act, 47 U.S.C. § 152 note, provides:

"**(b) Antitrust laws.—**

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act [Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, for distribution of which see Short Title note set out under section 609 of this title] shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) Repeal.—[Par. (2) repealed subsection (a) of section 221 of this title].

(3) Clayton Act.—[Par. (3) amended section 18 of Title 15, Commerce and Trade]."